No. 209.

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

JAMES EVERARD'S BREWERIES, APPELLANT,

v.

RALPH A. DAY, PROHIBITION DIRECTOR OF THE STATE OF NEW YORK, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE APPELLEES.

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STATUS.

This is one of several suits brought to test the constitutionality of the National Prohibition Act as supplemented by the Act of Congress approved November 23, 1921, Chap. 134, 42 Stat. 222, commonly known as the Willis-Campbell Act. The several suits are described in the appellant's brief, pp. 2–3. The instant suit was filed in the District Court for the Southern District of New York by appellant to restrain the various appellees in their respective capacities from enforcing the provisions of the Willis-Campbell Act, upon the ground that

Congress exceeded its authority so far as Section 2 of that Act is concerned. The case came before Judge Hand on appellant's motion for a preliminary injunction and appellees' motion to dismiss. The motion for a preliminary injunction was denied and the motion to dismiss granted, without opinion (R. 58). The case is here on direct appeal.

STATEMENT.

Appellant James Everard's Breweries is a New York Corporation and has its principal place of business in New York City. For a number of years prior to the adoption of the Eighteenth Amendment it was engaged in the manufacture and sale of lager beer and other malt liquors for use principally as beverages. After the adoption of the Amendment and the passage of the National Prohibition Act, the ruling of the Attorney General of March 3, 1921, and the issuance of Treasury Decision 3239, appellant and other breweries throughout the country applied to the Commissioner of Internal Revenue for permits to manufacture intoxicating malt liquors, such as beer, ale, porter, etc., for medicinal purposes. On November 15, 1921, a permit was issued to appellant, and thereafter it actively engaged in the manufacture and sale of such liquors for medicinal purposes until the passage of the Act Supplemental to the National Prohibition Act on November 23, 1921, which revoked appellant's permit, as well as those issued to physicians and pharmacists, respectively, for the prescription and sale of medicinal beer.

Alleging that the enactment of the Supplemental Act, in so far as it attempts to provide "That only spirituous and vinous liquor may be prescribed for medicinal purposes, and all permits to prescribe and prescriptions for any other liquor shall be void," is beyond the power conferred on Congress by the Eighteenth Amendment, and therefore unconstitutional and void, appellant brought this suit to restrain the appellees from enforcing the terms and provisions of the Act by declining further to approve applications of druggists and physicians, respectively, to sell and prescribe intoxicating malt liquors brewed for medicinal purposes, and from interfering with appellant's manufacture of such liquors and their sale for medicinal purposes to permittee druggists (R. 2–15). The bill was dismissed, as above stated.

CONSTITUTIONAL AMENDMENT AND STATUTES INVOLVED.

The Eighteenth Amendment to the Constitution provides:

> SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.
>
> SECTION 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

The Act of October 28, 1919, Chap. 85, 41 Stat. 305, officially styled The National Prohibition Act, provides, Title II:

> SEC. 1. When used in Title II and Title III of this Act (1) the word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes.
>
> SEC. 3. No person shall, on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

The Act of November 23, 1921, Chap. 134, 42 Stat. 222, supplementing the National Prohibition Act, and commonly known as the Willis-Campbell Act, provides:

> SEC. 2. That only spirituous and vinous liquor may be prescribed for medicinal purposes, and all permits to prescribe and prescriptions for any other liquor shall be void.

QUESTIONS INVOLVED.

The questions presented are:

(1) Whether in enacting Section 2 of the Willis-Campbell Act Congress exceeded its powers, in view of that portion of the Constitution which limits to Congress the express powers delegated to it, and expressly reserves to the States those powers not delegated.

(2) Whether the police power of internal regulation in respect to the rights of citizens of States, and more particularly in respect to health, have been delegated under the Eighteenth Amendment to Congress, or is a power reserved to the individual States under the general police power vested in them.

(3) Whether the Act is destructive of the personal liberty of the physician to prescribe and of the patient to be treated in such manner as the physician, from his knowledge and experience, deems best for the patient.

(4) Whether the enactment is an unwarrantable interference with and destruction of the right of breweries to cooperate with physicians, patients, and druggists in the manufacture and sale of intoxicating malt liquors for medicinal purposes, a use not prohibited by the Eighteenth Amendment.

ARGUMENT.

I.

In passing upon the constitutionality of the Eighteenth Amendment, this Court, in National Prohibition Cases, 253 U. S. 350, 386, said:

> That Amendment, by lawful proposal and ratification, has become a part of the Constitution, and must be respected and given effect the same as other provisions of that instrument.

Purpose and effect of Eighteenth Amendment.

The purpose and effect of the Eighteenth Amendment are to impose a general prohibition upon the traffic in intoxicating liquors for beverage purposes throughout the territorial limits of the United States.

The Amendment prohibits the manufacture, sale, or transportation of intoxicating liquors for beverage purposes. It, however, does not define what are intoxicating liquors, but having forbidden traffic in intoxicating liquors for beverage purposes it confers upon Congress and the several States the power and authority to define what are intoxicating liquors within the Constitutional inhibition. In pursuance of such authority, Congress has defined said liquors as including any liquids, by whatever name called, containing one-half of one per centum or more of alcohol by volume which are fit for use for beverage purposes, and such definition has been sustained by this court as a proper exercise of legislative authority to effectuate the purpose of the Amendment, even though this definition might prohibit

the manufacture and sale of liquors not intoxicating in fact. *National Prohibition Cases, supra.*

Section 2 of the Amendment provides, *inter alia*, that Congress and the several States have concurrent power to enforce this article by "appropriate legislation." "Appropriate legislation," as used in this section, necessarily means such legislation as will tend to make this constitutional provision completely operative and effective; that is, legislation which will give full force and effect to the constitutional inhibition against the traffic in intoxicating liquor. The duty of enforcing this prohibition carries with it full power to do all things necessary for its accomplishment. This is the construction put upon these words as found in other parts of the Constitution. See *Ex Parte Virginia*, 100 U. S. 339.

The unquestioned purpose of the Amendment is absolutely to prohibit all traffic in and use of intoxicating liquor for beverage purposes and to protect the people against the well-known evils of such traffic; and in order completely to effectuate that purpose Congress has been clothed with full power so to legislate with respect to the subject matter as to completely and effectively accomplish that purpose.

II.

Scope of power of Congress.

The power of Congress effectively to prohibit the manufacture and sale of intoxicating liquors for beverage purposes is as full and complete as the police powers of the States effectively to enforce such

prohibition in order to promote the health, safety, and morals of the community. The Eighteenth Amendment conferred no new power or authority to make or sell intoxicating liquors for medicinal purposes. The States already had full police power over the subject.

Without the Eighteenth Amendment the Willis-Campbell Act would have been an attempted exercise of police power. It is admitted that that power has never been delegated by the States to the Federal Government. If, however, Congress can not effectively enforce the provisions of the Amendment except by the exercise of a qualified police power, it is well settled that it may exert such power. In *Hamilton* v. *Kentucky Distilleries Company*, 251 U. S. 146, this Court said (p. 156):

> That the United States lacks the police power and that this was reserved to the States by the Tenth Amendment is true. But it is none the less true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power, or that it may tend to accomplish a similar purpose.

In *Hoke* v. *United States*, 227 U. S. 308, where it was contended that the White Slave Act infringed the police powers of the State, this Court said (p. 323):

> The principle established by the case is the simple one, when rid of confusing and distracting considerations, that Congress has power over transportation "among the several

> States"; that the power is complete in itself, and that Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulation.

And in *Ruppert* v. *Caffey*, 251 U. S. 264, 299, this Court held that the incidents attending the exercise by Congress of its war power to prohibit the liquor traffic are the same as those that attend the States' prohibition under the police power.

See also *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 215; Cooley's Constitutional Limitations, Fifth Ed., p. 724.

There is no distinction between the power of States with respect to prescribing liquors for medicinal purposes under the so-called police power and the power of the Federal Government under the prohibition amendment to the Federal Constitution. The power of the Federal Government under the prohibition amendment is as broad and as general as is the power of the States under their police powers to deal with the subject. The Amendment to the Constitution gives Congress power to legislate to prevent the manufacture and sale of intoxicating liquors for beverage purposes. The States have power under their police powers to prohibit the sale of intoxicating liquors for beverage purposes. The powers are defined and limited in exactly the same way, and manifestly the limitations upon both must be the same. In other words, whatever a State may do under its police powers

effectively to prohibit the manufacture and sale of liquor for beverage purposes, Congress may do under the Amendment.

What, then, is the extent of the power of the States over the subject under their police powers?

III.

Power of States effectively to prohibit the sale of intoxicating liquor for beverage purposes.

The power of the States effectively to prohibit the sale of intoxicating liquors for beverage purposes has been sustained, and it has been universally and consistently held that this power carries with it the right on the part of the legislature to prohibit those acts which in its judgment would prevent the enforcement of the law against the recognized evil.

In the case of *Purity Extract Company* v. *Lynch*, 226 U. S. 192, was involved a statute of Mississippi prohibiting the sale of malt liquors called "Poinsetta." It appeared that this malt liquor contained no alcohol, was nonintoxicating and could not be mistaken for beer. The manufacturer contended that the statute was unconstitutional. In upholding its constitutionality this Court, through Mr. Justice Hughes, said (p. 201):

> That the State in the exercise of its police power may prohibit the selling of intoxicating liquors is undoubted. * * * It is also well established that when a State exerting its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable rela-

> tion to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government.

And again (p. 204):

> It was competent for the Legislature of Mississippi to recognize the difficulties besetting the administration of laws aimed at the prevention of traffic in intoxicants. It prohibited, among other things, the sale of "malt liquors." In thus dealing with a class of beverages which in general are regarded as intoxicating, it was not bound to resort to a discrimination with respect to ingredients and processes of manufacture which, in the endeavor to eliminate innocuous beverages from the condemnation, would facilitate subterfuges and frauds and fetter the enforcement of the law. A contrary conclusion logically pressed would save the nominal power while preventing its effective exercise.

The general prohibition of the sale of malt liquors, whether intoxicating or not, as a necessary means of suppressing the traffic in liquors seems to be consistently upheld by the State courts. See

State v. *O'Connell*, 99 Maine, 61.
State v. *Jenkins*, 64 N. H. 375.
State v. *York*, 74 N. H. 125.
State ex rel. v. *Kauffman*, 68 Ohio St. 635.
Pennell v. *State*, 141 Wis. 35.

In *Booth* v. *Illinois*, 184 U. S. 425, the question was whether the Legislature of Illinois had the power to declare illegal options to sell and buy grain, although no element of gambling was involved. This Court, in upholding the constitutionality of the statute, said (p. 429):

> A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be toward that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the State thinks that certain admitted evils can not be successfully reached unless that calling be actually prohibited, the courts can not interfere unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law.

IV.

Power of States to prohibit acts, innocent in themselves, in order to effectuate purposes of main prohibition.

It is well settled that a State, in enacting legislation prohibiting certain acts regarded as a public evil, may include acts, innocent in themselves, but which have been shown by experience to be necessary to be included in the prohibition of the statute in order to effectuate the purpose of the main prohibition.

In *Crane* v. *Campbell*, 245 U. S. 304, a statute of Idaho which rendered criminal the mere possession of whisky for personal use was attacked on the ground that it conflicted with the Fourteenth Amendment. In disposing of the case this Court said (p. 307):

> It must now be regarded as settled that, on account of their well-known noxious qualities and the extraordinary evils shown by experience commonly to be consequent upon their use, a State has power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders without violating the guarantees of the Fourteenth Amendment. * * * As the State has the power above indicated to prohibit, it may adopt such measures as are reasonably appropriate or needful to render the exercise of that power effective.

In *Pennell* v. *State*, 141 Wis. 35, the Court, in upholding a statute which included within its purview certain acts innocent in themselves, said (p. 40):

> This principle has been applied to liquor laws quite uniformly and with reference to statutes substantially like ours which prohibit the sale not only of intoxicants but of those nonintoxicating beverages the sale of which might easily be made a cover for the sale of intoxicants.

In *Otis* v. *Parker*, 187 U. S. 606, this Court held (p. 609):

> If the State thinks that an admitted evil can not be prevented except by prohibiting a calling or transaction not in itself necessarily

objectionable, the courts can not interfere, unless, in looking at the substance of the matter they can see that it is a clear, unmistakable infringement of rights secured by the fundamental law.

V.

Congress has power to prohibit acts, innocent in themselves, which are necessary to be prohibited in order to carry out a constitutional mandate.

So, likewise, Congress in enforcing the Eighteenth Amendment has full power to prohibit certain acts, innocent in themselves, which common experience shows are necessary to be prohibited in order to regulate an abuse of, and put an end to obstructions to, the general prohibition of the use of intoxicating liquors for beverage purposes as contained in the Eighteenth Amendment and the National Prohibition Act.

In *Ruppert* v. *Caffey*, *supra*, this Court said (p. 300):

> The implied war power over intoxicating liquors extends to the enactment of laws which will not merely prohibit the sale of intoxicating liquors but will *effectively prevent* their sale.

With the foregoing principles in mind, we come to consider the statute in question.

VI.

The Willis-Campbell Act is constitutional.

The Act of November 23, 1921, supplementing the National Prohibition Act, is a lawful exercise by Congress of the constitutional power conferred upon

it by the Eighteenth Amendment effectually to prevent the traffic in intoxicating liquors for beverage purposes as defined by Congress, and said Act is constitutional.

(A) Purpose of the act.

Nothing was said in the Volstead Act about prescribing beer or wine for medicinal purposes, but the Attorney General ruled that under that Act beer or wine might be prescribed for such purposes. The limitation in the law applying only to spirituous liquors (Title II, Sec. 7), it followed that if beer and wine could be prescribed at all for medicinal purposes they could be prescribed in any quantity. Because of this situation, Congress passed the present Act providing that only spirituous and vinous liquor may be prescribed for medicinal purposes. (Senate report No. 201, 67th Cong., 1st Sess.). Congress had not intended by the Volstead Act to allow the indiscriminate prescribing of beer as a medicine and thereby to defeat the purpose of that Act and the Eighteenth Amendment, so the new Act writes nothing into the law not contemplated by the Volstead Act which has been held constitutional by this Court. It is merely an amendment to cure defects in that Act developed in the course of its enforcement.

(B) Congress has not exceeded its powers.

In approaching this subject it is well to bear in mind the very common and notorious difficulties always attendant upon the efforts of the States and

the Federal Government to suppress the liquor traffic. That these difficulties are recognized by this Court is shown by the following language in the *Purity Extract Company case, supra:*

> It was competent for the Legislature of Mississippi to recognize the difficulties besetting the administration of laws aimed at the prevention of traffic in intoxicants—

And in *Ruppert* v. *Caffey, supra:*

> That the Federal Government would, in attempting to enforce a prohibitory law, be confronted with difficulties similar to those encountered by the States, is obvious.

It also should be remembered that the Volstead Act, to which the present Act is an amendment, provides, Sec. 3, Title II, that all the provisions of the Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

The power conferred upon Congress by Section 2 of the Eighteenth Amendment is plain in its nature and commits to Congress the discretion to determine the legislation necessary and appropriate to enforce the provisions of Section 1 of the constitutional amendment.

Congress, having been given full authority to make complete and effective the constitutional inhibition against the traffic in and use of intoxicating liquors for beverage purposes, may very properly deem it wise to place limitations upon the use of such liquors and even prevent the use of certain specified liquors

for medicinal purposes so as to prevent the sale of such liquors for beverage purposes, for it is well known that the unrestrained traffic in liquor for medicinal purposes results in great abuses and serves as a ready means of defeating the constitutional inhibition against the use of same for beverage purposes.

As the power completely and effectively to prohibit the traffic in and use of intoxicating liquor for beverage purposes has been conferred upon Congress, to deny it the right to regulate the use of such liquor for nonbeverage purposes or even absolutely forbid the use of certain intoxicating liquor for nonbeverage purposes might well destroy the power of Congress to enforce the prohibition in the Eighteenth Amendment. It is submitted that no such situation is contemplated by the Eighteenth Amendment. On the contrary, the power to make effective the constitutional inhibition against traffic in intoxicating liquors for beverage purposes very obviously includes, if that power is to exist, the power to deal with abuses of and obstructions to the constitutional inhibition, such as the procuring of intoxicating liquors ostensibly for medicinal purposes, but designed and intended for use for beverage purposes.

If an intoxicant may be used for medicinal purposes, as it may under the Constitution and the law, and its manufacture and use for such purposes are likely to lead, as undoubtedly they are, to its manufacture and sale for beverage purposes, it is unquestionably within the power of Congress to regulate

its manufacture and use for medicinal purposes, in order that it shall not be diverted from that use to a prohibited purpose.

Of course, there are limitations beyond which Congress can not go. If the enactment has no reasonable relation whatever to the prohibition of the manufacture and sale of liquor for beverage purposes, confessedly it is beyond the power of Congress. Congress could regulate or prohibit nothing that had no immediate reference to the prevention of the use of intoxicating liquors for beverage purposes. But this Court held in the *Purity Extract Company case, supra*, that the prohibition of the sale of malt liquor that was non-intoxicating, and had no alcoholic content whatever, was reasonably adapted to secure the end of the prohibition of the manufacture and sale of intoxicating liquors for beverage purposes. This Court said (p. 201):

> When a State exerting its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective.

So here, Congress may prevent the manufacture and sale of malt liquors for medicinal purposes, if, in its legislative judgment, the manufacture and sale of such liquor would make easier the avoidance of the Constitution and statute intended to prevent the use of intoxicating liquors for beverage purposes.

Furthermore, the Eighteenth Amendment prohibits the manufacture and sale merely of intoxicating liquors. This court held in effect (*National Prohibition Cases, supra*) that it was within the power of Congress to include also the manufacture and sale of liquors which are not intoxicating, if the manufacture and sale of such nonintoxicating liquors would make easier the manufacture and sale of intoxicating liquors for beverage purposes. If, therefore, Congress may extend or expand, so to speak, the constitutional amendment with reference to intoxicating liquors so as to bring in those that are not intoxicating, the manufacture and sale of which would prevent the enforcement of the statute, likewise Congress may expand the other portion of the amendment, viz., the phrase "for beverage purposes," and include purposes other than those that are beverage, if the sale for those purposes will render it impossible to carry out the purposes of the Amendment or the statute for its enforcement.

If for the purpose of effectually preventing the illegal manufacture and sale of intoxicating liquors it becomes necessary to regulate their manufacture and sale for legitimate purposes, as experience has shown it is, then Congress may exercise that power and enact such reasonable legislation as is calculated to effect that end. Accordingly Congress may regulate the manufacture and sale of liquor for medicinal purposes, and in so doing unquestionably may prohibit the prescription by a physician of such liquor as in the judgment of Congress and the medical

profession has no therapeutic value. It therefore becomes a question of fact whether there was sufficient evidence before Congress to enable it to say in this instance that beer has no therapeutic value, or that it has so little value as that to permit it to be prescribed for medicinal purposes would largely defeat the purposes of the Amendment. What was the evidence on that subject?

(C) Beer not a medicine.

The Judiciary Committee of the House held exhaustive hearings on the question whether beer has any therapeutic value. (House Committee on Judiciary Hearings, Prohibition Legislation, 1921, 67th Cong., 1st Sess.) All interests were permitted to present their views and the matter was fully debated by both houses. (Cong. Rec., 67th Cong., 1st Sess., Vol. 61, pp. 3094–3136; 3454–3461; 3595–3596; 4032–4039; 8748–8756.) The evidence presented to the committee that beer is not recognized as a medicine was overwhelming. (House Report No. 224, 67th Congress, 1st Sess.) The evidence showed that beer and other malt liquors serve no medical purpose which can not be satisfactorily met in other ways. If a patient needs alcohol it can be prescribed. If malt be sometimes of use it may be prescribed, or the two may be combined in a prescription so as to secure their utility.

A large majority of the reputable physicians of the country are fully convinced that alcohol has no medicinal or tonic value no matter in what form

administered. They believe that the sole use of alcohol in a medicine is as a solvent for medicinal properties which otherwise would be difficult of employment, and that beer is no remedy of any sort for any kind of disease whatever.

Seventy-eight per cent of the 152,627 physicians of the country have taken out no permits whatever, and in 24 States no physicians have permits to prescribe liquors for medicinal purposes. Only 22 per cent of the physicians of the United States prescribe liquors of any kind. Twenty-nine States of the Union have laws now in force prohibiting the prescribing of beer as a medicine.

The ~~National~~ United States Pharmacopoeia, which is the official and recognized list of useful medical drugs and chemicals of the United States, and is to the medical profession what the decisions of this court are to the legal profession, never included beer as a medicine. Nor is it included as such in the reputable textbooks generally used throughout the medical schools. Its use as a medicine is discountenanced by the most eminent physicians, surgeons, and scientists. It has been rejected by professors of medicine in 24 reputable medical colleges, including the special research institutions for medical advancement, such as The Rockefeller Institute, The Mayo Foundation, and other expert institutions.

In 1917 the American Medical Association, which comprises 150,000 physicians in the United States, declared that the use of alcohol as a therapeutic agent should be discouraged.

The evidence before the committee was to the effect that if beer were permitted as a medicine it would be impossible to enforce the prohibition law. It was shown that immediately after the Attorney General's ruling that beer might be prescribed as a medicine, about 100 breweries filed applications for permits to manufacture beer for medicinal purposes. In a large majority of the States beer could not be prescribed or sold as a medicine. Four or five breweries probably could supply all the beer that was needed for such purpose, so Congress might have readily concluded that to bring in 95 or 96 more would force these into illegitimate trade in order to exist. In such a situation, and especially since beer has never been recognized as a medicine by any reputable authority, it was reasonable for Congress to prohibit by law the use of beer as a medicine.

It was stated that the regulations established under the Volstead Act limiting the prescriptions of spirituous liquor worked well and that there was very little complaint by legitimate practitioners. But some, who did not have the high ethical standards of the large majority, abused the privilege, writing hundreds of prescriptions for such liquors within a few days while the total number of other prescriptions was negligible. It was not difficult, therefore, for Congress to visualize the return of breweries and saloons to fill prescriptions for alcoholic beverages which would be issued under the guise of medicinal prescriptions by the small minority of unethical physicians.

Moreover, the absolute prohibition of all alcoholic beverages for medicinal use would not deprive the medical profession of the fullest and most effective medicinal use of alcohol. An intoxicating beverage is not an indispensable medium for the medical administration of alcohol. Nothing is added to or taken from the action and effect of alcohol by mixing it with or separating it from the other ingredients of intoxicating liquor. Alcohol is used principally as a solvent, and the use of alcohol as a medical agent, separated from intoxicating beverages, is not inhibited by the Eighteenth Amendment or the enforcement law.

Most of the States have more stringent provisions than the one in question, so this legislation will work no hardship on the profession. With the small demand for even spirituous intoxicants in medical practice, when experts largely testify that it has no medical value whatever, and when the difficulties of enforcing the prohibition laws would be so greatly augmented, it is clear that Congress could reasonably say that beer should not be added to the list of medical remedies.

The prohibition of beer as a medicine has a substantial bearing on the prohibition of beer as a beverage, and it is respectfully submitted that in view of the evidence before it Congress has not transcended its power or abused its discretion in determining that beer has no therapeutic value and in forbidding its prescription as a medicine.

(D) No unreasonable interference with personal rights or with States' police powers.

Appellant earnestly contends that the enactment in question interferes with the internal regulation in respect of the rights of citizens of the States, especially as to health; is destructive of the rights and liberties of the physician and the patient; and is an attempt to regulate the practice of medicine, a power reserved to the States.

So far as such rights are based on the police powers of the States, they come within the principle announced in *Jacobson* v. *Massachusetts*, 197 U. S. 11, 25, that "A local enactment or regulation, even if based on the acknowledged police powers of a State, must always yield in case of conflict with the exercise by the general government of any power it possesses under the Constitution." There is nothing in the nature of an intoxicating beverage or in the act of prescribing it which gives it or the physician any immunity from the constitutional restriction, and the patient has no natural right to the administration of such beverages in contravention of the Constitution. There is here no attempt to limit or hamper a physician in the legitimate practice of his profession, or to establish health regulations in the States further than is reasonably necessary. If there be any interference as claimed by appellant, there is only such as is reasonably necessary to carry out the constitutional mandate, and power for this, to the extent necessary, has been delegated to Congress by the Eighteenth Amendment. It is conceded that Con-

gress has no power as such to regulate the practice of medicine. But it does have the power to prohibit the sale of intoxicating liquors for beverage purposes; and if, in order to accomplish that end, it is necessary to regulate or restrict the manufacture and sale of liquor for medicinal purposes it may do so, and it may regulate the medical profession to that extent, and to that extent only.

Appellant's argument might be applied to the Narcotic Drugs Act, chap. 1, 38 Stat. 785, whose purpose it was to prevent the use of narcotic drugs by addicts and for purposes that are illegitimate; but Congress found that it became necessary to restrict physicians in the way that they should prescribe narcotic drugs in order that the prohibition against the sale of them for illegitimate uses might be made effective. See *United States* v. *Doremus*, 249 U. S. 86; *Webb* v. *United States*, 249 U. S. 96; *United States* v. *Behrman*, 258 U. S. 280.

This principle runs all through this Court's decisions with respect to the powers of the Federal Government. For instance, the power to regulate commerce is, of course, the power to regulate interstate and foreign commerce, but this Court uniformly has held that if it is necessary to accomplish that end Congress may, as an incident, also regulate intrastate commerce. That is to say, in order to make effective legislation respecting interstate commerce Congress has power incidentally, and so far as is necessary, to regulate intrastate commerce. See *Southern Ry. Co.* v. *United States*, 222 U. S. 20; *Minnesota Rate Cases*, 230 U. S. 352; *Wisconsin R. R. Com.* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563.

VII.

Congress the sole judge of the methods to be employed and of the necessity for executing a constitutional power.

In the exercise of its power to make effective the prohibition of intoxicating liquors for beverage purposes Congress is the sole judge of the methods to be employed and of the necessity which occasions their employment in order to carry said power into execution.

No principle of constitutional law is more firmly established than that the court may not in passing upon the validity of a statute inquire into the motives of Congress or the wisdom of the legislation, nor will it pass upon the necessity for the exercise of a power possessed by the legislature. If evidence was required, it will be presumed that it was before the legislature when the act was passed.

United States v. *Des Moines Co.*, 142 U. S. 510.
McCray v. *United States*, 195 U. S. 27.
Weber v. *Freed*, 239 U. S. 325.
Rast v. *Van Deman Co.*, 240 U. S. 342.

The language of Mr. Justice Story in *Martin* v. *Hunter*, 1 Wheat. 304, is especially applicable in this instance. In speaking of the Constitution he said (p. 327):

> Hence its powers are expressed in general terms, leaving to the legislature from time to time to adopt its own means to effectuate legitimate objects, and to mould and model

the exercise of its powers as its own wisdom and the public interest should require.

VIII.

Statutes and acts of the legislatures are presumed to be constitutional.

It is well settled that statutory enactments, solemnly enacted by the legislative branch of the Government, are presumed to be constitutional and the burden of proving any particular statute to be unconstitutional is upon the party attacking such statute. Every reasonable presumption will be made in favor of the statute and the statute will be upheld by the courts unless it is clearly shown to be unconstitutional. It has even been held that a Federal statute will not be declared void by the courts unless it appears, *beyond a reasonable doubt*, that it is not within the constitutional power of Congress. In the case of *United States* v. *United Shoe Machinery Co.*, 234 Fed., 127, 143, the Court said:

> It is a well-settled rule that the courts are slow to declare the acts of coordinate departments of the Government void, and unless it appears beyond a reasonable doubt that the act is violative of the fundamental law of the United States the courts will uphold it.

In *Interstate, etc., Railway Co.* v. *Mass.*, 207 U. S. 79, 88, this Court said:

> It is not enough that a statute goes to the verge of constitutional power. We must be able to see clearly that it goes beyond that power. In case of real doubt a law must be sustained.

IX.

Conclusion.

It is respectfully submitted that the Act entitled "An Act Supplemental to the National Prohibition Act" approved November 23, 1921, is a valid exercise of the power conferred upon Congress by the Eighteenth Amendment to pass appropriate legislation to effectuate the constitutional prohibition against intoxicating liquors for beverage purposes, and that the Act is constitutional.

JAMES M. BECK, *Solicitor General.*

MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

MAHLON D. KIEFER, *Attorney.*

DECEMBER, 1923.

○

SUPREME COURT OF THE UNITED STATES

October Term, 1923

No. 302

JAMES EVERARD'S BREWERIES
Complainant-Appellant

against

RALPH A. DAY, Prohibition Director of the State of New York; FRANK K. BOWERS, Collector of Internal Revenue for the Second District of New York; WILLIAM HAYWARD, United States Attorney; and DAVID H. BLAIR, as Commissioner of Internal Revenue
Defendants-Appellees

Brief on Behalf of Samuel W. Lambert, as Amicus Curiae

DAVIES, AUERBACH & CORNELL
Solicitors for Samuel W. Lambert

JOSEPH S. AUERBACH
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Supreme Court of the United States

JAMES EVERARD'S BREWERIES,
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Defendants-Appellees.

OCTOBER TERM, 1923.

No. 200.

BRIEF ON BEHALF OF SAMUEL W. LAMBERT, AS AMICUS CURIAE.

With the consent of counsel for the Department of Justice of the United States and for the plaintiff, counsel for Dr. Samuel W. Lambert, in *Lambert* v. *Yellowley*, 291 Fed., 640, beg leave of this Court to file the accompanying pleadings and briefs submitted to Judge Knox, in the United States District Court for the Southern District of New York, and also for convenient reference, the opinion in that case, wherein he has held that the clause of

the Volstead Act prohibiting physicians from prescribing to any patient more than one pint of liquor in any ten days is unconstitutional.

The opinion is referred to a number of times in appellant's brief in the case at bar, and the argument is made that the authority of such decision, inferentially, at any rate, is applicable to pharmacist and brewer in the distribution and manufacture of malt liquor for medicinal purposes (Appellant's Brief, p. 35).

The *Lambert case* is on appeal by the Government. Effort has been made to facilitate an early review by this Court, so that the law may be definitely settled. Matters of procedure have thus far made such review impracticable. The interlocutory decree overruling the Government's motion to dismiss is now before the Circuit Court of Appeals for the Second Circuit.

Our suggestion that the order of Judge Knox be made final, or that the Government join with us in requesting the Circuit Court of Appeals to certify to this Court the question as to the unconstitutionality of that part of the Volstead Act involved in the *Lambert Case*, has not met with acceptation on the part of the Government.

We respectfully suggest that such order should have been made final, notwithstanding the expression of opinion by Judge KNOX that:

> "So far as I am informed, the legislation complained of does not purport to be based upon any finding as to the quantity of liquor that reasonably and properly may be required within a specified period for the treatment of disease. If otherwise, I should be inclined to dismiss the bill, it being my impression that within reasonable limits the quantity to be

> prescribed may be regulated by Congress. But, accepting the complaint as made, the limitation now imposed seems to be arbitrary and without justification. Should the proof show the contrary to be the fact, the complainant, of course, cannot prevail."

For no finding by Congress could confer upon it the right to limit the amount of intoxicating alcoholic liquor requisite, in the opinion of the trained physician, for the medicinal needs of the patient. For the Eighteenth Amendment confers upon Congress only the right to forbid by appropriate legislation the manufacture of and traffic in intoxicating liquors for beverage purposes.

Moreover, it appears by the convincing and unchallenged medical authority cited in the Appendix to the Brief for Dr. Lambert (p. 81), that not infrequently it is essential for curative purposes to administer intoxicating liquor through the rectum.

In order, therefore, to have the inhibition of the Volstead Act concerning medical prescriptions upheld, the words "appropriate legislation" in the 18th Amendment, must be construed as entitling Congress, under its commission to prevent the use of *intoxicating liquors for beverage purposes*, to forbid the administration of a necessary amount of alcohol *for the prolongation or even the saving of life by means of the nutritive or stimulating enema.*

Perhaps unreason may attain to a more superlative degree in asserting that the legislation complained of is "appropriate"; but we submit that unique intellectual resourcefulness would be required to conceive of it.

On the other hand, the right to regulate strictly the giving of prescriptions so that intoxicating

liquors purporting to be for medicinal purposes may not be diverted to beverage purposes, is within the power of Congress and of the Executive Department of the Government. In the Harrison Drug Act, which forbids the giving of narcotic drugs to addicts, it is provided—in order to make impracticable the giving of narcotic drugs by unworthy physicians to the addict under the guise of medicine to those entitled to it—that all prescriptions be kept for two years, subject to visitation by the Government.

Dr. Lambert in this case is in favor not only of like regulations but of much more drastic ones. For as will be seen by its Resolution at page 30, The Association for the Protection of Constitutional Rights, of which he is the President, recommends, among other things, that all prescriptions given by physicians be impounded by the Government, so that the unworthy physician may write a count in his own indictment.

Action by Congress, however, must take the form of kindred regulations and not the form of prohibition; and therefore the decision of Judge KNOX should be regarded in law as a final adjudication upon the subject.

The *Lambert case* presents the question of the constitutional right of a physician to practise medicine and to prescribe in the cure of his patients according to his best and, therefore, untrammeled scientific judgment. The action has been brought by a physician of admitted standing and repute in defense of the essential right and duty of his profession. It is in the nature of a class suit, for an association of distinguished physicians and surgeons sponsors it.

It is a matter of grave concern to the people of this country, as well as to him, that this decision remain the law. He, therefore, asks leave to submit this brief in support of such decision, in so far as its principles may, on the present appeal, be drawn into controversy.

Relation of Case at Bar to Physician's Right to Prescribe.

In the case at bar it is contended that the Willis-Campbell Act is unconstitutional in its denial of the right to manufacture malt liquor for medicinal purposes (Appellant's Brief, p. 2).

In the *Lambert case*, malt liquor was not especially involved. No right of manufacture was involved. The right only to prescribe liquor as a medicine was presented. The constitutional question was approached from the standpoint of the rights and duties of the medical profession. Through this profession the privilege of the sick to be cured and protected by the best available means was urged. It is not over-emphasis to say that the issues of life and death were definitely presented.

The particular statute claimed and held unconstitutional was the latter part of Section 7 of Title II of the Volstead Act, reading as follows:

> "Not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days."

Respectfully submitted,

DAVIES, AUERBACH & CORNELL,
Attorneys for Complainant.

JOSEPH S. AUERBACH,
MARTIN A. SCHENCK,
Of Counsel.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SAMUEL W. LAMBERT,
Complainant,

against

EDWARD C. YELLOWLEY, as Acting Federal Prohibition Director; DAVID H. BLAIR, as Commissioner of Internal Revenue, and WILLIAM HAYWARD, as United States Attorney,
Defendants.

Upon Motion of Defendants After Answer to Dismiss Complaint.

DAVIES, AUERBACH & CORNELL, Attorneys for Complainant (JOSEPH S. AUERBACH and MARTIN A. SCHENCK, of Counsel);

WILLIAM HAYWARD, United States Attorney, for Defendants (JOHN HOLLEY CLARK, Assistant United States Attorney, of Counsel).

KNOX, D. J.:

Complainant, a duly licensed physician under the laws of this State, is here engaged in active practise. He alleges it to be an essential part of his professional right and duty towards his patients to treat their diseases and promote their physical well-being according to his best skill and

judgment, and, to that end, to advise the use of such medicine and medical treatment as in his opinion are best calculated to effect their cure and establish their health.

Based upon his experience, observation and study of medical science, complainant believes that the use as medicine of spirituous liquors, to be taken internally, is, in certain cases, necessary for the proper treatment of patients in order to afford relief from known ailments. Such spirituous liquors contain more than one-half of one per cent. of alcohol by volume and include brandy, whiskey and wine.

Plaintiff now has under observation and subject to his professional advice certain patients whose ailments require that they should, for proper relief, use internally more than one pint of spirituous liquor in ten days, and that in certain cases it is necessary for proper medical treatment that the patient should use internally some spirituous liquor without delay, notwithstanding that within a preceding period of less than ten days the patient may have received and used more than one pint of such liquor. Complainant, conceiving it to be his duty so to do, intends, unless restrained by lawful authority, to issue prescriptions in such cases according to his best skill and judgment.

Complainant has not prescribed, and does not intend to prescribe, the use of liquor for beverage purposes, nor does he intend to prescribe the use of liquor as medicine unless, after careful physical examination, he in good faith believes that the use of liquor as medicine is necessary for the patient and will afford him relief from some known ailment.

In practising his profession, as above outlined, Dr. Lambert finds himself confronted with certain provisions of the National Prohibition Act and its amendment, as follows:

Section 7 of Title II of the Act of which reads:

> "No one but a physician holding a permit to prescribe liquor shall issue any prescription for liquor. And no physician shall prescribe liquor unless after careful physical examination of the person for whose use such prescription is sought, or if such examination is found impracticable, then upon the best information obtainable, he in good faith believes that the use of such liquor as a medicine by such person is necessary and will afford him relief from some known ailment. Not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days."

Similar provision relating to vinous and spirituous liquor is contained in the Act of November 23, 1921, entitled, "An Act Supplemental to the National Prohibition Act."

Both the original Act and its supplement make a violation of any of their provisions a crime, subjecting the offender to fine or imprisonment or both.

The bill goes on to allege that neither of the enactments purports to regulate the use for beverage purposes of spirituous liquors lawfully possessed, nor do they prohibit the giving of advice by any person in respect to such use or the quantities to be used. Neither do they purport to regulate the use of lawfully possessed spirituous liquors for medicinal purposes otherwise than under physicians' prescriptions, nor to regulate the giving of

advice in regard to such use, except in the case of physicians' prescriptions.

It is claimed that the limitations thus attempted to be imposed upon physicians are beyond the authority conferred upon Congress by the Eighteenth Amendment to the Constitution, and are void and of no effect.

All this is followed by an allegation that defendants have claimed and publicly stated that they will prevent, and have threatened by legal proceedings charging complainant with crime and attempting to subject him to fine and imprisonment, to prevent him from prescribing for use as medicine to be taken internally by any patient within any period of ten days, more than one pint of spirituous liquor, even though in his best judgment and after careful physical examination of the patient, such use is necessary to afford relief from some known ailment. Such proceedings, it is said, would seriously interfere with complainant's ability to practise his profession, and would subject him to irreparable damage, for which there is no adequate legal remedy. The matters complained of are asserted to be of common concern to many patients and many physicians, a number of whom have formed an organization called The Association for the Protection of Constitutional Rights, and by resolution have declared in favor of this suit.

In consideration of the foregoing, the Court is asked to declare unconstitutional so much of the aforementioned Acts of Congress as to which complaint is made.

The answer sets up that the matter here in controversy does not exceed in value the sum of $3,000, exclusive of interest and costs, and denies

that there is any duty upon a physician to prescribe medicine contrary to law; alleges that a large number of physicians deny the therapeutic value of spirituous liquors, and that prescriptions of more than one pint of such liquors within ten days in any case is not considered necessary by a large number of reputable physicians.

In view of the motion to dismiss, which admits the well-pleaded allegations of the complaint, the answer upon the issuable facts need not be considered.

Whether or not the use of liquor in the treatment of certain known ailments is a valuable therapeutic agent is a controversial subject with which the Court is not, at present, particularly concerned. That the subject is highly controversial, is indicated by the results of a questionnaire directed to upwards of 30,000 physicians. Of this number, 51 per cent. declare whiskey to be necessary in the treatment of certain diseases, and 49 per cent. take a contrary view.

For the purposes of this motion, it is sufficient to accept the allegations of the complaint, and to consider that Congress itself, in the very legislation under attack, has recognized that in certain cases liquor has a legitimate medicinal use, and has specified the circumstances under which it may be prescribed in given instances. The difficulty is that, having done so, Congress, without reference to the quantity of liquor actually required for the proper treatment of a particular ailment from which a patient may be suffering, and irrespective of the good faith, judgment and skill of the physician in attendance, proceeds to limit the amount to be prescribed to not more than a pint within a period of ten days.

In passing upon the propriety of such limitation, it is necessary to bear in mind the grant of power under which the National Prohibition Law and its amendments were enacted, and also to inquire "whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat." *Purity Extract Co.* v. *Lynch*, 226 U. S., 192; *Ruppert* v. *Caffey*, 251 U. S., 264.

The Eighteenth Amendment to the Constitution was designed to bring about the prohibition of intoxicating liquor "for beverage purposes," and was not, I think, intended to put an end to the use of liquor for purposes regarded by those who proposed the amendment, and by many of the States that ratified it, as justifiable and proper. This view was, in part, at least, entertained by Congress in enacting the Volstead law, which permits the sale and use of sacramental wines; the use, in *bona fide* hospitals or sanatariums of such quantity of liquor, as may properly be administered under the direction of a duly qualified physician employed therein, to a person suffering from alcoholism, and the use of industrial alcohol, under certain restrictions, in arts and sciences. So far as the sacramental use of wine is concerned, there is no specified limitation of the quantity that may be purchased and consumed. Instead of manifesting the same solicitude for the physical well-being of a person suffering from a disease (other than alcoholism), the proper treatment of which demands more than a pint of liquor within ten days, that it evinced for the spiritual comfort and welfare of members of certain religious sects, Congress

restricted in the manner complained of, the medicinal use of intoxicating liquor.

If, as the complaint alleges, the administration to a patient of more than the statutory quantity of liquor is *necessary* for his relief from a certain known ailment, the inability of such patient to have his legitimate needs supplied, means that he is subjected to a prohibition that certainly is not within the terms of the Eighteenth Amendment, and which easily may be imagined, might subject him to serious consequences, if not death itself. While the exercise of regulatory power in the interest of the public at large frequently brings about individual hardship, it is to be recalled that one of its chief objects is to preserve—and is not to jeopardize and destroy—the health of its citizens. For this reason, I feel that persons are not to be deprived of the use, when required, of such medicines as are proper and necessary for their relief, unless authority for such deprivation has expressly been conferred.

All of us recognize that the unregulated use of morphine, cocaine and other habit-forming drugs may have most baneful effects; but who would say they should not, in a proper case, be prescribed by a competent physician?

Of course, the assertion can and probably will be made that the possibilities to which I have referred are a far call from the probability that any such result would be brought about through the absence of liquor from the treatment of any known ailment. It is, however, to be remembered that the admitted allegations of the complaint are that the use of more than a pint of liquor within ten days is necessary for the treatment of certain known ailments—the statute admits that the use

of liquor may sometimes be necessary—and "necessary," while it may mean something less than indispensable, at least, includes that which is desirable, advisable and needful.

If this be true, it would seem not to be a function of the Congress—particularly under the amendment—to invade, as it were, the domain of medical authority, and to deprive patients of that which they need, and, by every principle of right and justice, are entitled to have. Having assumed so to do, it would appear that the action does not constitute legislation appropriate to the object sought to be attained through the adoption of the amendment. To me it seems reasonably clear that the right of the public to have available for its use, when required in the proper treatment of disease, an adequate supply of a valuable therapeutic agent, transcends the present power of Congress to decree otherwise upon the basis of expediency or policy. Under the facts presented by the complaint, the danger that persons bent upon a violation of the Volstead law may, through the medicinal use of liquor, be furnished with a means of procuring intoxicants for beverage purposes, is to be overcome through regulations. These may be of the most stringent character, but they must in my opinion, fall short of an actual prohibition against the use of liquor to the extent demanded by the reasonable neecessities of the proper treatment of known ailments.

So far as I am informed, the legislation complained of does not purport to be based upon any finding as to the quantity of liquor that reasonably and properly may be required within a specified period for the treatment of disease. If otherwise, I should be inclined to dismiss the bill, it being

my impression that within reasonable limits the quantity to be prescribed may be regulated by Congress. But, accepting the complaint as made, the limitation now imposed seems to be arbitrary and without justification. Should the proof show the contrary to be the fact, the complainant, of course, cannot prevail.

As bearing upon what was sought to be accomplished through the instrumentality of the Eighteenth Amendment, I quote from the Report of the Senate Judiciary Committee, dated June 11, 1917, in which the adoption of a concurrent resolution submitting the amendment to the States was recommended. The Committee in setting forth some of the arguments advanced by proponents of the measure reported the following:

> "National law, enacted under an amended Constitution, could prohibit transportation and sale, and in concurrence with like legislation by the states (the union of the power of the nation and the power of the states), thus securing the entire strength of the whole community, could soon put an end to the traffic. Under such restriction in a generation or two the consumption of alcohol as a beverage would practically disappear. Alcohol would still be manufactured, distributed and sold under the restrictions appertaining to other poisons; and its *use as a medicine* (italics mine) and in the arts would not be interfered with. Its manufacture and distribution would be controlled by like regulations as those made with reference to dynamite, nitroglycerine, and gunpowder, and the whole family of poisons, and in fact, all articles of great and dangerous potency which, nevertheless, have *their legitimate uses for the benefit of mankind*."

I have little or no doubt that it was the impelling force and reasonableness of the thought ex-

pressed by the foregoing quotation that brought about the submission of the amendment to the several States, and was responsible for its ratification by forty-five of them.

Again, it is interesting in this connection to glance at the prohibition laws of some of the States and to see how they regard the medicinal use of liquor or of alcohol.

In Kentucky, the Supreme Court, speaking in the case of *Sarrls* v. *Commonwealth*, 83 Ky., 427, said:

> "* * * while the Legislature has the power to regulate the sale of liquor to be used as a beverage, or to prohibit its sale for that purpose altogether, it cannot exercise that power so arbitrarily as to prohibit the use or sale of it as a medicine."

and again:

> "* * * the power of the legislature to prohibit the prescription and sale of liquors to be used as medicines does not exist, and its exercise would be as purely arbitrary as the prohibition of its use and sale for religious purposes."

Missouri ratified the amendment upon January 16, 1919, and in the enforcement of the law, which took effect upon the date that the amendment became operative, permitted the prescriptions by physicians of either alcohol or wine for medicinal purposes. The amount to be thus prescribed was not arbitrarily fixed. As late as March 28, 1921, the Legislature of that State amended the law so as to permit the prescription of intoxicating liquor other than that specified in the Act of January 16, 1919.

The State of Nevada, in a prohibition statute, enacted pursuant to a vote of her people, upon

November 5, 1919, gave permission to physicians to prescribe pure grain alcohol for medicinal purposes, and imposed no arbitrary limitation upon the quantity that might be used.

A somewhat similiar statute is in force in New Mexico.

The Constitution of Michigan, Section 11, Article 16, makes provision for the prohibition of the liquor traffic, except for medicinal, mechanical, chemical, scientific or sacramental purposes, and directs that legislation provide for regulations upon the sale of intoxicants. I find no artificial limitation upon the quantity that physicians may prescribe for medicinal use. For a construction of the State statute, see *People* v. *Ureavitch,* 210 Mich., 431.

For years a law of Indiana made unlawful the retailing of spirituous liquor without license, and contained no exception in favor of a sale for medicinal purposes. By a long line of decisions, it has been held that a *bona fide* sale for such purposes was not within the statute. See *Donnell* v. *State,* 2 Ind., 608; *State* v. *Sholts,* 15 *Id.,* 449; *Nixon* v. *State,* 76 Fed., 524. The present law, I am informed, provides only that it shall be unlawful for any licensed physician to issue a prescription for intoxicating liquor except in writing, or in any case, unless he has good reason to believe that the person for whom it is issued will use the same for medicinal or surgical purposes or as an antiseptic.

Alabama prohibits the sale of intoxicants for medical purposes save upon prescription of a regularly authorized physician.

In Florida, alcohol may be prescribed and used for medicinal purposes, and so in Mississippi, South Carolina, Georgia, Arkansas, Delaware,

Oklahoma, Oregon, Tennessee and Texas. In North Carolina, grain alcohol may be sold for medicinal purposes, and it may be prescribed under certain conditions in Washington. In South Dakota, spirituous and vinous liquors may be prescribed. The statute of Kansas excepts from its operations the medicinal use of intoxicating liquors. Colorado and Minnesota regulate the quantity of liquor that may be prescribed upon one prescription, but they do not declare the amount that a patient shall use within a specified time.

Utah prohibits the prescription of any compound containing more than one-half of one per cent. of alcohol by volume, and which is capable of being used as a beverage, and it is possible that a few other States have laws as drastic. I think, however, that it is fair to say that as a whole the ratifying States did not mean to dispense with the adequate use in a given case of such amount of specified intoxicants as were believed to possess therapeutic value.

It is, however, argued that, irrespective of all that has been said, the cases of *Purity Extract Co.* v. *Lynch* and *Ruppert* v. *Caffey, supra,* make it necessary to dismiss the complaint. I freely admit those decisions give me pause. Nevertheless, it is to be remembered that the results in those cases were in no small measure based upon the legislative and judicial history of many of the States in dealing with local prohibition statutes. Under such a course of reasoning, I feel that much support is to be found for complainant's contention in the preceding summary of legislation within the States where prohibition has been recognized for many years to be a proper and desir-

able policy. The regard which they manifested for the preservation of the right of the public to resort to the medicinal use of intoxicating liquors in the treatment of known ailments is not without influence in placing a construction upon legislation enacted pursuant to the limited authority of the Eighteenth Amendment.

From the foregoing, I have reached the conclusion that the limitations of the Volstead Act, and its amendments, which make it lawful to prescribe but one pint of intoxicating liquor for the internal and medicinal use of a person whose known ailment, if it is properly to be treated, requires the administration of a greater quantity, are void. An injunction *pendente lite* may issue against the defendant.

May 8, 1923.

U. S. D. J.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SAMUEL W. LAMBERT,
Complainant,

against

EDWARD C. YELLOWLEY, as Acting Federal Prohibition Director, DAVID H. BLAIR, as Commissioner of Internal Revenue, and WILLIAM HAYWARD, as United States Attorney,
Defendants.

To the Honorable Judges of the District Court of the United States, Southern District of New York, Sitting in Equity:

The complainant, by Davies, Auerbach & Cornell, his attorneys, for his bill of complaint against the defendants, respectfully shows:

FIRST: The complainant is a citizen and resident of the State of New York, residing in the County of New York.

SECOND: The defendant, Edward C. Yellowley, is an agent of the Commissioner of Internal Revenue, duly appointed under the provisions of the National Prohibition Act; the defendant, David H. Blair, is the Commissioner of Internal Revenue, and the defendant William Hayward is the

United States Attorney for the Southern District of New York. All said defendants are charged with the duty of enforcing the National Prohibition Act in the County of New York and elsewhere in the Second Collection District of New York.

THIRD: This is a suit of a civil nature arising under the Constitution and laws of the United States. The matter in controversy exceeds the sum or value of Three thousand Dollars ($3,000), exclusive of interest and costs.

FOURTH: For the purpose of protecting the health and lives of its citizens against disease, the State of New York has from time to time enacted laws requiring that the persons practicing medicine must be specially educated and trained as physicians, and that advice in regard to the use of medicines and drugs as an incident of medical treatment should be given only by persons educated and trained for the medical profession. The said State has also provided by law that when so educated and trained and authorized to practice in accordance with the said laws, and not otherwise, physicians may give advice in regard to the use of medicines and drugs as an incident of medical treatment.

FIFTH: Heretofore and in the year 1885, complainant, after having expended time and money in regularly prescribed training and studies to that end, was duly authorized by the State of New York to practice, and acquired the right to practice, medicine in the healing and curing of the sick and in the protection of human beings against attacks of disease, and ever since complainant has been continuously in the practice of such pro-

fession and is now practicing the same and enjoys a good reputation and standing as a physician.

SIXTH: It is an essential part of complainant's right as a physician and of his duty toward his patients to treat their diseases and promote their physical well-being according to the untrammeled exercise of his best skill and scientifically trained judgment, and, to that end, to advise the use of such medicines and medical treatment as in his opinion are best calculated to effect their cure and establish their health. By practicing medicine the complainant is authorized to and does hold himself out to the world as willing to place at the service of patients such skill and judgment as are above described, to the full extent of his ability.

SEVENTH: According to the usage and practice of the medical profession, long established and generally accepted, physicians, in advising the use of drugs and medicines, do so by written statements containing explicit directions as to the time and manner of administration and as to the quantities to be used. Such written statements and directions are called prescriptions. In issuing a prescription the physician assumes no responsibility and exercises no control in respect to procuring the drugs or medicines prescribed, but merely expresses his judgment as to what the needs of the patient require for the restoration of health.

EIGHTH: It is the belief and judgment of the complainant based upon his experience and observation and the study of medical science, that, the use as medicine of spirituous liquors to be taken internally is, in certain cases, necessary for the proper treatment of patients in order to afford re-

lief from known ailments. By spirituous liquors, complainant means liquors containing more than one-half of one per cent. of alcohol by volume, including brandy, whiskey and wine.

NINTH: In prescribing drugs and medicines, the determination of the quantity to be used involves a consideration of the physical condition of the patient, and of the probable effect thereon of such drugs and medicines, in each specific case. It is the belief of complainant, based upon his experience and observation and the study of medical science, that in the use of spirituous liquors as medicine it is in certain cases, including cases now under complainant's observation and subject to his professional advice, necessary, in order to afford relief from some known ailment, that the patient should use internally more than one pint of such liquor in ten days and that it is in certain cases necessary for proper medical treatment that the patient should use internally some spirituous liquor without delay, notwithstanding that within a preceding period of less than ten days the patient may have received and used more than one pint of such liquor. Complainant conceives it to be his duty and intends, unless restrained by lawful authority, to issue prescriptions in such cases according to his best skill and judgment.

TENTH: Complainant has never prescribed and does not intend to prescribe the use of liquor for beverage purposes. Complainant does not intend to advise or prescribe the use of liquor as medicine unless, after careful physical examination of the patient, he in good faith believes that the use of such liquor as medicine by the patient is neces-

sary and will afford relief to him from some known ailment.

ELEVENTH: By Section 7 of Title II of the National Prohibition Act it is provided in respect to physicians:

> "No one but a physician holding a permit to prescribe liquor shall issue any prescription for liquor. And no physician shall prescribe liquor unless after careful physical examination of the person for whose use such prescription is sought, or if such examination is found impracticable, then upon the best information obtainable, he in good faith believes that the use of such liquor as a medicine by such person is necessary and will afford relief to him from some known ailment. Not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days."

Similar provisions limiting the amount of vinous or spirituous liquor that may be prescribed for the use of any one person during any period of ten days are contained in the Act signed by the President on the 23d day of November, 1921, entitled "An Act supplemental to the National Prohibition Act."

Section 29 of the National Prohibition Act purports to make a violation of any of its provisions a crime and purports to subject the offender to fine or imprisonment or both. Like penalties are provided for a violation of the above mentioned supplement to said Act.

TWELFTH: Neither the National Prohibition Act nor the above mentioned supplement purports to regulate the use for beverage purposes of spir-

ituous liquors lawfully possessed, nor does either of said Acts prohibit the giving by any person of advice in respect to such use or the quantities to be used. Neither of said Acts purports to regulate the use for medicinal purposes of spirituous liquors lawfully possessed, otherwise than under a physician's prescription, and neither Act purports to regulate the giving of advice in regard to such use except in the case of physicians' prescriptions.

THIRTEENTH: Complainant is advised and respectfully represents to the Court as matter of law, that so much of the National Prohibition Act as purports to prohibit physicians from advising or prescribing the use, internally, for medicinal purposes by any person of more than one pint of spirituous liquor within any period of ten days, and so much of the said Act entitled "An Act supplemental to the National Prohibition Act" as purports to limit the quantity of vinous or spirituous liquor that may be advised or prescribed by a physician for use, internally, for medicinal purposes by any person within the same period, are and each of them is beyond the authority conferred upon Congress by the Eighteenth Amendment to the Constitution of the United States, or otherwise, and are void and of no effect.

FOURTEENTH: The defendants have claimed and publicly stated that they will prevent, and have threatened by legal proceedings charging complainant with crime and attempting to subject him to fines and imprisonment, to prevent the complainant from prescribing for use as medicine to be taken internally by any patient within any period of ten days, more than one pint of spir-

ituous liquor, even though in complainant's best judgment, after careful physical examination of the patient, such use is necessary in order to afford relief from some known ailment. Such threatened proceedings would seriously interfere with complainant's ability to practice his profession and would subject him to irreparable damage.

FIFTEENTH: The threats and public statements herein complained of are directed not only against plaintiff, but against other physicians of like belief and judgment in respect to the matters aforesaid, under like circumstances, and are therefore a matter of common concern to many physicians and to many patients. At a meeting of the Association for the Protection of Constitutional Rights, an association of physicians having an extended and responsible practice, there was duly adopted a resolution, of which a copy, with the names of some of the members of said Association, is hereto annexed, marked "Exhibit A."

SIXTEENTH: For the matters herein alleged the complainant has no adequate remedy at law.

WHEREFORE, the complainant respectfully prays an injunction, both permanent and temporary, restraining the defendants from interfering with complainant in his acts as a physician in prescribing vinous or spirituous liquors to his patients for medicinal purposes, upon the ground that the quantities prescribed for the use of any one person in any period of ten days exceed the limits fixed by said Acts, or either of them.

And the complainant prays that the Court by its decree declare unconstitutional so much of the Act

of Congress designated as the National Prohibition Act and so much of the Act of Congress signed by the President on the 23rd day of November, 1921, entitled "An Act Supplemental to the National Prohibition Act," as are herein complained of.

And the complainant further prays for such other and further relief as may be just, including such preliminary restraining order as will protect the complainant's rights; and further prays that a writ of subpoena issue herein, directed to the above-named defendants, commanding them on a day certain to appear and answer this complaint.

DAVIES, AUERBACH & CORNELL,
Attorneys for Complainant,
34 Nassau Street,
New York City.

State of New York, }
County of New York, } ss.:

SAMUEL W. LAMBERT, being duly sworn, deposes and says that he is the complainant in the foregoing action, that he has read the complaint herein, and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

SAMUEL W. LAMBERT.

Sworn to before me this }
day of November, 1922. }

EXHIBIT A.

At a meeting of the Association for the Protection of Constitutional Rights, after full discussion and deliberation, the following Resolution was adopted:

WHEREAS, The Eighteenth Amendment to the Constitution of the United States provides only that

> "After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited";

and

WHEREAS, in such Amendment there is no restriction, directly or indirectly, of the right of physicians to issue prescriptions for alcoholic liquor; and

WHEREAS, Section 7 of Title II of the National Prohibition Act, purporting only to carry said Amendment into effect, provides as follows:

> "Sec. 7. No one but a physician holding a permit to prescribe liquor shall issue any prescription for liquor. And no physician shall prescribe liquor unless after careful physical examination of the person for whose use such prescription is sought, or if such examination is found impracticable, then upon the best information obtainable, he in good faith believes that the use of such liquor as a medicine by such person is necessary and will afford relief to him from some known ailment. Not more than a pint of spirituous liquor to

be taken internally shall be prescribed for use by the same person within any period of ten days and no prescription shall be filled more than once. Any pharmacist filling a prescription shall at the time indorse upon it over his own signature the word 'cancelled,' together with the date when the liquor was delivered, and then make the same a part of the record that he is required to keep as herein provided";

and

WHEREAS, subdivision (a) of Section 77 of Article XIII of the Regulations to said Act, in assumed furtherance of said Act, provides as follows:

"(a) No prescription may be issued for a greater quantity of intoxicating liquor than is necessary for use as a medicine by the person for whom prescribed, and in no case may spirituous liquor in excess of 1 pint within any period of 10 days be prescribed for the same person by one or more physicians. Further, where spirituous liquor is being administered to any person by any physician or physicians as provided in section 71, the aggregate quantity so administered and the quantity prescribed for any such person may not exceed 1 pint within any period of 10 days";

and

WHEREAS, Section 71 of the said Regulations provides that

"Physicians may obtain not more than 6 quarts of liquor during any calendar year to be administered to their patients only in the

quantities necessary to afford relief at the time of administering";

and

WHEREAS, the purport of such Section 7 of Title II of said Act is repeated in Section 2 of An Act entitled "An Act Supplemental to the National Prohibition Act"; and

WHEREAS, this Association is advised that the alleged justification for such provisions of the Act and Regulation is, that failure so to restrict the right of physicians to prescribe alcoholic liquor as a medicine would necessarily operate to defeat the enforcement of the Volstead Act; and

WHEREAS, such a view is not only unjustified, but is a wholly unwarranted reflection upon the good faith of the Medical Profession of America as a whole; and

WHEREAS, the right to practice medicine is a Constitutional right; and, in the opinion of a vast number of physicians the administration of alcoholic liquor is essential for patients *in extremis*, for prolongation of life and for promoting recovery during convalescence, and that such administration is prevented by such Act and Regulation;

NOW, THEREFORE, BE IT

RESOLVED, that it is the sense of this Association that the constitutionality of such provision of the Act and the validity of such Regulation be forthwith submitted to the courts; and that this Association request its president, Dr. Samuel W. Lambert, under advice of counsel, to institute litigation to this end, in the interest of the public health and the preservation and prolongation of life,

and for the vindication of the rights and honor of the profession; and it is

FURTHER RESOLVED, that the members of this Association, however, favor and will advocate the enactment of such Regulations as will require physicians prescribing alcoholic liquor in such amounts as they deem proper, to file any and all prescriptions with properly designated Governmental authorities, in order that any abuse by unworthy practitioners of the right to administer alcoholic liquor may be prevented and the offenders adequately and summarily punished.

Brewer, George E.
Brooks, Harlow
Biggs, Hermann M.
Brown, Samuel A.
Brill, Nathan E.
Bacon, Gorham
Cussler, Edward
Caldwell, William E.
Carr, Walter Lester
Carter, Herbert S.
Chetwood, Charles H.
Coakley, Cornelius G.
Carlisle, Robert J.
Coleman, Warren
Chace, Arthur E.
Cahill, Geo. F.
Creevey, Geo. M.
Clemens, James B.
Darrach, Wm.
Downes, William A.
Draper, Wm. Kinnicutt
Duel, Arthur B.
Dana, Charles L.
Davis, Asa B.
Delatour, Beeckman J.
Dunning, Henry S.
Draper, George
Einhorn, Max
Edgar, J. Clifton
Erdmann, John F.
Ewing, James
Farrell, Benjamin P.
Fisher, Edward D.
Flint, Austin
Ferdyce, John A.
Foord, Andrew G.
Gibson, Charles L.
Gregory, Menas S.
Gorton, James T.
Goodridge, Malcolm
Hurd, Lee Maidment
Halsey, Robert H.
Hartwell, John A.
Hess, Alfred F.
Holden, Frederick C.
Haynes, Royal S.
Holland, Arthur L.
Hitzrot, James Morley
Hunt, J. Ramsey
Hammond, Graeme M.
Hooker, Ransom S.
Hoag, Arthur F.
James, Henry
Kast, Ludwig
Keyes, Edward L., Jr.
Lusk, William C.

Lyle, Wm. G.
Lambert, Alexander
Lambert, Samuel W.
Longcope, Warfield T.
Libman, Emanuel
Lambert, Adrian Van Sinderen
McCarthy, Joseph F.
McKernon, James F.
McSweeney, Edward S.
Manges, Morris
Norton, Nathaniel R.
Northrup, William P.
Norrie, Van Horne
Nammack, Charles E.
Niles, Walter L.
Oppenheimer, B. S.
Oastler, Frank R.
Pedersen, James
Painter, H. McM.
Patterson, Henry S.
Pulley, William J.
Reese, Robert G.
Russell, James I.
Roberts, Dudley
Shelby, E. P.
Sondern, Frederic E.
Smith, Harmon
Squier, J. Bentley
Studdiford, William E.
Stewart, George D.
Smith, Thomas A.
Sayre, Reginald H.
Saunders, T. Laurance
Sacks, Bernard
Taylor, Howard C.
Tilney, Frederick
Tyson, H. H.
Taylor, Fielding L.
Vaughan, Harold S.
Wightman, Orrin S.
Wallace, George B.
Wadhams, Samuel M.
Wilcox, Herbert B.
Wheelwright, Joseph S.
Whipple, Allen O.
Winter, Henry Lyle
Zinsser, Hans
Zabriskie, Edwin G.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SAMUEL W. LAMBERT,
Complainant,

against

EDWARD C. YELLOWLEY, as Acting Federal Prohibition Director; DAVID H. BLAIR, as Commissioner of Internal Revenue, and WILLIAM HAYWARD, as United States Attorney,
Defendants.

COMPLAINANT'S BRIEF.

Complainant sues for an injunction restraining defendants from interfering with him in the practice of his profession by prescribing liquor to his patients for medicinal purposes.

The suit involves the question of the authority of Congress, in enforcing the Eighteenth Amendment relating solely to the prohibition of intoxicating liquor "for beverage purposes," to prohibit its prescription as a medicine by physician to patient.

The issues arise upon a complaint and answer, under defendants' motion to dismiss. Such motion admits the facts alleged in the complaint (*Street* v. *Lincoln Safe Deposit Co.*, 254 U. S., 88, at 89).

Statement of Facts.

The complainant—of peculiar distinction in his profession—is a physician admitted to practice in the year 1885 under and pursuant to the laws of the State of New York, the sovereignty having jurisdiction in such matters. The complainant, by virtue of training and studies and compliance with the State regulations, acquired the right to practise medicine in the healing and cure of the sick and in the protection of human beings against attacks of disease. He has been continuously in the practice of such profession and enjoys a good reputation and standing as a physician.

It is alleged in Paragraph Sixth of the complaint that it is an essential part of complainant's right as a physician and of his duty towards his patients to treat their diseases and to promote their physical well-being according to the untrammelled exercise of his best skill and scientifically trained judgment, and, to that end, to advise the use of such medicines and medical treatment as in his opinion are best calculated to effect their cure and establish their health. The answer, in respect of this allegation, denies that it is an essential part of complainant's right as a physician or of his duty towards his patients to prescribe any medicine or medical treatment which it is contrary to law to prescribe, "even though such medicine and medical treatment are, in his opinion, best calculated to effect the cure and establish the health of the patients."

The complaint alleges that it is the belief and judgment of the complainant, based on his experience and observation and the study of medical

science, that the use as a medicine of spirituous liquors, to be taken internally, is, in certain cases, necessary for the proper treatment of patients in order to afford relief from known ailments. The answer does not deny these allegations, but quite irrelevantly, asserts, that it is the belief and judgment of a large number of reputable physicians that the use of spirituous liquors is never necessary for the proper treatment of patients in order to afford relief from ailments.

The complaint sets forth that in prescribing drugs and medicines, the determination of the quantity to be used involves a consideration of the physical condition of the patient, and of the probable effect thereon of such drugs and medicines in each specific case.

> "It is the belief of complainant, based upon his experience and observation and the study of medical science, that in the use of spirituous liquors as medicine it is in certain cases, including cases now under complainant's observation and subject to his professional advice, necessary, in order to afford relief from some known ailment, that the patient should use internally more than one pint of such liquor in ten days, and that it is in certain cases necessary for proper medical treatment that the patient should use internally some spirituous liquor without delay, notwithstanding that within a preceding period of less than ten days the patient may have received and used more than one pint of such liquor. Complainant conceives it to be his duty and intends, unless restrained by lawful authority, to issue prescriptions in such cases according to his best skill and judgment."

The answer does not deny these allegations, but,

with like irrelevancy, asserts that large numbers of eminent, reputable physicians deny that spirituous, intoxicating liquors have any value as medicine; and the defendant further alleges on information and belief, that the prescription of more than one pint of such liquor in ten days for any complaint is not considered necessary by any large number of reputable physicians in the United States.

The complaint alleges, and the defendants admit, that complainant has never prescribed and does not intend to prescribe the use of liquor for beverage purposes; that complainant does not intend to advise or prescribe the use of liquor as a medicine unless, after a careful physical examination of the patient, he in good faith believes that the use of such liquor as medicine by the patient is necessary and will afford relief to him from some known ailment. (Complaint, Paragraph Tenth.)

The complaint then sets forth the provisions of the National Prohibition Act and of the supplemental Act prohibiting the prescription of spirituous liquor by a physican to a patient in amounts of more than one pint within a period of ten days or containing more than one-half pint of alcohol. (Complaint, Paragraphs Eleventh and Twelfth.)

It is then alleged in Paragraph Thirteenth of the complaint that so much of such Acts as prohibits physicians from advising or prescribing the use of more than one pint of spirituous liquor within any period of ten days, is beyond the authority conferred upon Congress by the Eighteenth Amendment to the Constitution, and is void and of no effect.

The threats of the defendants to enforce these provisions of the Acts against the complainant and against physicians similarly situated are set forth in Paragraphs Fourteenth and Fifteenth.

The issue is therefore clearly presented on the pleadings and on the motion to dismiss. The qualifications of complainant to practice medicine and his belief in the necessity of prescribing spirituous liquor in excess of one pint in ten days in the cure of his patients and in the cure of patients now under his charge, are admitted. The situation is not qualified or changed by the assertion on the part of the defendants that other physicians, who have not these patients in charge, are not so situated or do not find it necessary in their opinion to give such prescriptions.

A representative character has been given to the suit by the fact that the complainant sues not only on his own behalf but in association with a large number of physicians of standing who find themselves prohibited from rendering to their patients the essential service dictated by their best skill and judgment.

The resolution of the physicians in this matter is attached to the complaint and marked "Exhibit A."

The particular part of the Prohibition Act involved in this suit (Section 7 of Title II) is as follows:

> "No one but a physician holding a permit to prescribe liquor shall issue any prescription for liquor. And no physician shall prescribe liquor unless after careful physicial examination of the person for whose use such prescription is sought, or if such examination is found impracticable, then upon the best information obtainable, he in good faith believes that the

use of such liquor as a medicine by such person is necessary and will afford relief to him from some known ailment. *Not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days.*"

The Eighteenth Amendment, which is the claimed source of Congressional power in the matter, is as follows:

"Section 1.—"After one year from the ratification of this article the *manufacture, sale* or *transportation* of intoxicating liquors within, the *importation* thereof into, or the *exportation* thereof from the United States and all territory subject to the jurisdiction thereof *for beverage purposes* is hereby prohibited."

Section 2.—"The Congress and the several States shall have concurrent power to enforce this article *by appropriate legislation.*"

POINT I.

The Eighteenth Amendment does not prohibit or authorize the prohibition of prescriptions by physicians of liquor for medicinal purposes.

(a) *Rules of construction.*

The right to practice medicine is a property right. The power of regulating it falls within the police power of the separate States.

In the leading case of *Dent* v. *West Virginia,* 129 U. S., 114, the United States Supreme Court upheld the requirements imposed by the State Legislature of West Virginia that persons desiring to practice medicine fulfill certain qualifications and secure a certificate from the State Board of Health. In the

course of the opinion by Mr. Justice Field the nature of the right to practice medicine was passed upon by the Court (p. 121):

> "It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex, and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to every one on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. *The interest, or, as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken.*"

See also to the same effect:

Watson v. *Maryland*, 218 U. S., 173.

The regulation of this matter falls within the police power reserved in the separate states.

Meffert v. *Packer, et al.*, 195 U. S., 625;
Hawker v. *New York*, 170 U. S., 189.

Any authority of Congress in the matter must find its source in the Eighteenth Amendment; for by virtue of Article X of the Constitution, powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively, or to the people.

Congress has no plenary power in the premises and has no police power on either the subject of

liquor or on the subject of the practice of the medical profession.

Mr. Justice Brandeis, in *Hamilton* v. *Kentucky Distilleries*, 251 U. S., 146, at 156, said:

> "That the United States lacks the police power, and that this was reserved to the States by the Tenth Amendment, is true."
>
> See also *Kansas* v. *Colorado*, 206 U. S., 46, at 87.

Inasmuch as there is no plenary power on the part of Congress upon these subjects, any grant of power to Congress is in its very nature to be held within the limitations and terms of the grant. There is no justification for ignoring limitations, particularly in view of the fact that to do so would infringe upon the police power reserved to the States.

In *Barbier* v. *Connelly*, 113 U. S., 27, this Court, per Field, J., at page 31, said:

> "But neither the Amendment (Fourteenth Amendment)—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes called its police power, to prescribe regulations to promote the health, peace, morals, education, and general order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity."

See also:

> *Coosaw Mining Co.* v. *South Carolina*, 144 U. S., 550, 561;
>
> *United States* v. *Herron*, 20 Wall., 251, 263.

The purpose of the Eighteenth Amendment is clearly indicated and declared, and the limitations

upon the grant of power from States to Federal Government are unambiguously defined. Such limitations have an added force in the fact that there is not involved in the question merely an interpretation of the intention of the Federal Congress. The Amendment, being drawn by the Federal Congress, was submitted to the Legislatures of the different States for ratification. Its character as a constitutional amendment depends upon such ratification. Such ratification was granted upon the particular terms and limitations now to be found in it, and were conditioned upon such form and phraseology. There is, therefore, no justification in placing a meaning upon the Amendment broader or in any way different from that which must have been understood by the different State Legislatures when it was submitted to them for adoption.

(b) *Medical prescription not one of the five relationships prohibited.*

A reading of the Amendment discloses a clear limitation to five named relationships. It would have been a simple thing to attempt to express a prohibition against all relationships in alcoholic liquor. It is therefore clear that the *manufacture*, *sale* or *transportation* of intoxicating liquors within the United States, the *importation* into the United States and the *exportation* from the United States, were all intended to be prohibited. It is equally clear that the *prescription* of alcoholic liquors for medicinal purposes, a common and long-recognized relationship to liquor, not being prohibited in the Constitutional Amendment, and not fairly included among any

of the five stated relationships, were not intended thereby to be prohibited.

The prescription of liquor as a medicine is such a long-recognized relationship thereto that there is no justification on any strained construction of the language of the Amendment in including it within the classes specified. There was hardly a person of maturity at the time of the passage of this Amendment who at some time had not had liquor prescribed to him by his physician for some ailment. The omission of this class of relationship should therefore be controlling on the Courts in interpreting the meaning of the Amendment.

As the Court said in *United States* v. *Harris*, 177 U. S., 305, at 309:

> "It is not permitted to courts, in this class of cases, to attribute inadvertence or oversight to the legislature when enumerating the classes of persons subjected to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute."

(c) *Medicinal purpose not a beverage purpose.*

The Eighteenth Amendment contains a further clearly defined limitation, which modifies and controls each of the five definite classes of prohibited relationships. Neither manufacture nor sale nor transportation of intoxicating liquors are prohibited unqualifiedly and for all purposes. They are prohibited for one specific class of purpose. They are prohibited "for beverage purposes." Here, also, it would have been easy to seek to have made a general and sweeping prohibition. And, where commonly and through long periods of

time liquor had been used for a variety of different purposes, while the prohibition is directed to but one purpose, it is a recognition that the unspecified purposes are not prohibited. The phrase has no other meaning than as a limitation. Especially must this be so where, save for such Amendment, jurisdiction over the remainder and residue of the subject is in other sovereignties.

The construction of the language of the Amendment in this particular cannot be the subject of doubt. The term "for beverage purposes" was, at the time of the adoption of the Amendment, a term of clear import and accepted meaning. It had been used time and again in liquor legislation. It had been construed in judicial decisions. It was a term which not only did not include prescription for medical purposes, but which had been customarily used in contradistinction to prescription for medicinal purposes. **Beverage purpose was the antithesis of medicinal use.**

In *Commonwealth* v. *Mandeville*, 142 Mass., 469, the defendant was charged with violating a restricted license under which he was permitted to sell spirituous liquirs solely for medicinal, mechanical and chemical purposes and under which he had no right to sell intoxicating liquors "as a beverage." The Court, per Holmes, J., said (p. 469):

> "It is argued that a beverage is only a drink, and that liquors sold for medicinal purposes are sold to be used as a drink. But it is also argued that it may be necessary that liquors sold for medicinal purposes should be drunk on the premises. But, taking the whole instruction together, the meaning of the court was perfectly plain, and was correct. *Sales of*

liquors to be used as a beverage were spoken of by way of antithesis to sales for medicinal purposes, and signified sales of liquors to be drunk for the pleasure of drinking, as distinguished from sales of liquors, to be drunk in obedience to a doctor's advice."

In *Gue* v. *City of Eugene*, 100 Pac., 254 (Oregon), the statute involved contained the following provision:

> "It shall be unlawful for any person, firm, company, or corporation to sell, barter, or give away to any person or persons whomsoever within the city of Eugene, any intoxicating liquor, provided, however, nothing herein contained shall prohibit the sale of pure alcohol for scientific or manufacturing purposes, or wines to church officials for sacramental purposes, nor alcoholic stimulants as medicine in cases of actual sickness. * * * Nothing in this ordinance shall be construed to prevent one registered pharmacist selling such alcoholic liquors to another registered pharmacist."

The Court, in interpreting this section, said (p. 256):

> "'The use of liquor as a beverage,' say the editors of Words and Phrases (Volume 1, p. 76), 'does not mean simply that the same is to be drunk, but the word "beverage" is used to distinguish the act of drinking liquor for the mere pleasure of drinking from its use for medicinal purposes.' The phrase, 'for beverage purposes,' as used in the complaint, signifies a sale of malt liquor to a person in order to gratify an appetite for intoxicants, or for the mental exaltation or for the physical effect which the imbibing of a stimulant immediately affords, as contradistinguished from

a sale of such liquor for any of the objects authorized by the section of the ordinance under consideration. The complaint, in our opinion, sufficiently negatived any lawful sale of the liquor specified."

See, also:

State v. *Roach,* 75 Me., 123; and
State v. *Costa,* 62 Atl. (Vt.), 38 (*infra*).

In *Busch & Co.* v. *Webb,* 122 Fed., 655 (appeal dismissed 194 U. S., 640), the District Judge, in declaring that such portion of a State statute was unconstitutional which prohibited physicians not in active practice from prescribing liquor as a medicine, quoted with approval from the opinion in *Bowman* v. *State,* 40 S. W., 796. In that case the Court, construing a prohibition amendment to the State Constitution, said:

"It is a familiar rule of construction, applicable alike to statutes and constitutions, that all laws are to be construed with reference to the existing evils to be remedied. In passing the constitutional provision in question, there was *no existing evil in a sale of intoxicants as medicines or for sacramental purposes.* By reference to the history of those times, it will be seen that the restriction and the abolition of saloons was the subject aimed at. * * * Now, we take it, in adopting the provisions of the Constitution in question, the people intended to prohibit the liquor traffic, and, because the language used is general and comprehensive, it was not intended to put a limitation upon the Legislature to authorize the sale or disposition of liquor for purposes that were necessary and not harmful. When our people adopted this constitutional amendment, we were not unmindful that this was a

Christian country, in which the orthodox religion was the basis and substrata of our civilization, and to be considered *pari materia* with this provision of our Constitution they had in view, Section 6 of the Bill of Rights, which, among other things, provides: 'All men have the natural and indefeasible right to worship Almighty God according to the dictates of their own consciences,' etc., and further provides: 'And no human authority ought in any case whatever to control or interfere with the rights of conscience in the matter of religion, and no preference shall be given by law to any religious society or mode of worship.' It was not proposed to abolish the sacrament, which is one of the fundamental ceremonies of our religion, which idea would be involved in the construction sought—that wines could not be bought or sold for sacramental purposes. *It was further known at the time that alcohol in various forms was in common use among the people, in case of sickness, for medical purposes; alcohol in various forms entering into combination with many of the most useful medicines belonging to the profession. These were not evils to be provided against, but privileges to be conserved,* and it is not inimical to a proper construction of the provisions of the Constitution in question to interpret it in the light of the surrounding circumstances under which it was adopted."

In *Thomasson* v. *The State,* 15 Ind., 449, in interpreting a statute of absolute prohibition, the Court held, to quote the headnote:

"Though the law of March 5, 1859, regulating the sale of spirituous liquors, contains no exception of sales made for medicinal or sacramental purposes, the Court will make the exception in proper cases."

(d) *Prohibition Act recognizes that medical purpose is not a beverage purpose.*

The distinction between beverage purposes and prescription as a medicine is recognized in the National Prohibition Act and in the Act supplemental to the National Prohibition Act.

In the National Prohibition Act, in Section 1 of Title II, intoxicating liquor is defined as including certain named varieties containing one-half of one per centum or more of alcohol by volume "which are fit for use for beverage purposes." In Section 3 of Title II it is provided that, "All the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented." In the same section liquor "for non-beverage purposes" and wine "for sacramental purposes" are allowed to be manufactured and dealt in as in the Act provided. In Section 4 it is stated that certain therein enumerated articles are not to be subject to the provisions of the Act. Among those mentioned are medicinal preparations which are "unfit for use for beverage purposes," patent and proprietary medicines that are "unfit for use for beverage purposes," toilet, medicinal and antiseptic preparations and solutions that "are unfit for use for beverage purposes." It is in the same section further provided that any person who shall knowingly sell any of the aforementioned articles "for beverage purposes" or any extract or syrup "for intoxicating beverage purposes," shall be subject to the penalties provided for in the title.

The distinction between beverage purposes and medicinal purposes is further drawn in Section 6

of the Act which provides that no one shall manufacture, sell, purchase, transport or prescribe any liquor without first obtaining a permit from the Commissioner so to do, "except that a person may, without a permit, purchase and use liquor for medicinal purposes when prescribed by a physician as herein provided."

In the same section it is provided that "no one shall be given a permit to prescribe liquor unless he is a physician duly licensed to practice medicine and actively engaged in the practice of such profession." Here, also, the distinction between beverage purposes and medicinal use is drawn, for it is provided, "No permit shall be issued until a verified written application shall have been made therefor, setting forth the qualification of the applicant and the purpose for which the liquor is to be used." In the same section the distinction between beverage purpose and sacramental purpose is drawn, for it is provided, "Nothing in this Title shall be held to apply to the manufacture, sale, transportation, importation, possession or distribution of wine for sacramental purposes or like religious rites, except Section 6 (save as the same requires a permit to purchase) and Section 10 hereof, and the provisions of this Act prescribing penalties for the violation of either of said sections." The head of ecclesiastical jurisdiction is given authority to designate any rabbi, minister or priest to supervise the manufacture of wine to be used "for the purposes and rites in this section mentioned."

And, as pointed out under Point VII of the Brief, this method of dealing with the ecclesiastic authority to distribute—and even manufacture—sacramental wines, is the only constitutional way of

dealing with the use of alcoholic liquor for medicinal purposes. That is, by enacting such reasonable and appropriate provisions or regulations as are directed to the detection and adequate punishment of the unworthy physician who—under the subterfuge of prescribing alcoholic liquors for medicinal purposes—violates the Act by diverting them for the prohibited beverage purpose.

Section 7, which contains the prohibition herein complained of, even in making such prohibition recognizes the use of liquor as a medicine: "No one but a physician holding a permit to prescribe liquor shall issue any prescription for liquor. And no physician shall prescribe liquor unless after careful physical examination of the person for whose use such prescription is sought, or if such examination is found impracticable, then upon the best information obtainable, he in good faith believes that *the use of such liquor as a medicine* by such person is necessary and will afford relief to him from some known ailment. Not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days and no prescription shall be filled more than once." The section further provides that the physician who issues the prescription for liquor shall keep a record, alphabetically arranged in a book prescribed by the Commissioner, which shall show the date of issue, amount prescribed, to whom issued, "*the purpose or ailment for which it is to be used* and directions for using, stating the amount and frequency of the dose."

Section 8 provides: "No physician shall prescribe and no pharmacist shall fill any prescription for liquor except on blanks so provided, except in

cases of emergency, in which cases a record and report shall be made, and kept as in other cases."

In Section 27, intoxicating liquors "for medicinal, mechanical, or scientific uses," is recognized.

The Act Supplemental to the National Prohibition Act recognizes the distinction between medicinal purposes and beverage purposes. In Section 2 it provides "that only spirituous and vinous liquor may be prescribed for medicinal purposes, and all permits to prescribe and prescriptions for any other liquor shall be void." The physician is prohibited from prescribing "more than one-half pint of alcohol, for use by any one person within any period of ten days. No physician shall be furnished with more than 100 prescription blanks for use within any period of ninety days, nor shall any physicians use any more than that number of prescriptions within any such period unless on application therefor he shall make it clearly apparent to the Commissioner that for some extraordinary reason a larger amount is necessary, whereupon the necessary additional blanks may be furnished him." The same section provides for a change of formula in case it is made to appear to the Commissioner that any article, either medicinal preparation or proprietary medicine or other article specified in Section 4 of the National Prohibition Act, "is being used as a beverage, or for intoxicating beverage purposes."

The section further recognizes the distinction between beverage purposes, which it is the general intent of the National Prohibition Act to prohibit, and a current need for "all non-beverage uses": "No spirituous liquor shall be imported into the United States, nor shall any permit be granted authorizing the manufacture of any spirituous

liquor, save alcohol, until the amount of such liquor now in distilleries or other bonded warehouses shall have been reduced to a quantity that, in the opinion of the Commissioner, will, with liquor that may thereafter be manufactured or imported, be sufficient to supply *the current need thereafter for all non-beverage uses.*"

The distinction between beverage purposes and medicinal purposes apparent in the Eighteenth Amendment and recognized in the National Prohibition Act and in the Act Supplemental to the National Prohibition Act, is emphasized in the case at bar by the defendants' admission of the Tenth Paragraph of the complaint, which alleges:

> "Complainant has never prescribed and does not intend to prescribe the use of liquor for beverage purposes. Complainant does not intend to advise or prescribe the use of liquor as medicine unless, after careful physical examination of the patient, he in good faith believes that the use of such liquor as medicine by the patient is necessary and will afford relief to him from some known ailment."

The National Prohibition Act, in prohibiting a prescription by a physician to a patient of more than one pint of alcoholic liquor in a period of ten days, and the Act Supplemental to National Prohibition, in prohibiting the prescription by a physician to a patient of more than one-half pint of alcohol in any period of ten days, are without any qualifications or provisos.

They do not purport to be regulations, but are in terms and in effect prohibitions.

In the event that the patient in the preceding nine days has had, on doctor's prescrip-

tion, one pint of alcoholic liquor, he cannot on the tenth day, no matter what his need or his physician's trained opinion as to his necessities, have one drop more. His illness may take a sudden turn for the worse. An entirely new ailment may intervene, making prescription essential to prevent death. The Act contains no exceptions or qualifications. *The prohibition is absolute.*

These prohibitions find no justification in the Eighteenth Amendment. They are beyond each and all of the five specified relationships in liquor which the Eighteenth Amendment prohibits. They are furthermore, entirely outside of the general limits set forth in such Eighteenth Amendment, that the prohibition be a prohibition "for beverage purposes."

Although no case involving this particular question has, so far as we have been able to ascertain, been presented, the recitals of the courts as to the meaning of the Eighteenth Amendment show that the plain meaning herein urged has been in mind. Thus, in *Cornell* v. *Moore*, 257 U. S., 491, the Court, per McKenna, J., summarizing the Amendment and the legislation under it, said:

> "Before considering the provisions here specially involved, we may say that the act has been sustained, and it has been decreed that the power of Congress can be asserted against the disposal *for beverage purposes* of all liquor manufactured before the Amendment became effective, as it can be asserted against subsequent manufacture *for those purposes.* Either case is within the constitutional mandate and prohibition."

POINT II.

The salutary principle laid down in Purity Extract Co. v. Lynch, 226 U. S., 192 (sometimes referred to as authority for the prohibition of physician's prescriptions), and adopted in the reasoning of the Court in Ruppert v. Caffey, hereinafter discussed, has no application to this case.

The State of Mississippi had forbidden the sale of malted liquors; and the Courts of that State held that there was the accompanying right to prohibit the sale of any kind and condition of malted liquors for beverage purposes whether or not intoxicating. The Supreme Court of the United States sustained the decision of the Courts of Mississippi.

Judge Hughes, in his illuminating opinion said (p. 204):

> "It was competent for the legislature of Mississippi to recognize the difficulties besetting the administration of laws aimed at the prevention of traffic in intoxicants. It prohibited, among other things, the sale of 'malt liquors.' In thus dealing with a class of beverages which in general are regarded as intoxicating, it was not bound to resort to a discrimination with respect to ingredients and processes of manufacture which, in the endeavor to eliminate innocuous beverages from the condemnation, would facilitate subterfuges and frauds and fetter the enforcement of the law."

No other conclusion, either by the Courts of the State of Mississippi or by the Supreme Court of the United States, could reasonably have been expected.

Suppose, however, that Poinsetta, the prohibited malted preparation, had been for medicinal purposes, and was to be sold only on physicians' prescriptions pursuant to careful regulations, so that the violation of the Act of Mississippi against the use of intoxicating liquor for beverage purposes, would not have been promoted. Then, under the numerous cases cited in this brief, it is clear beyond argument that not even the State of Mississippi would have been authorized to forbid its use. And if the Courts of that State had held to the contrary, then clearly the Supreme Court would have reversed any such decision—under the very principle of the *Purity Extract* case itself.

In order to hold that Congress under the delegated police powers from the States, pursuant to the Eighteenth Amendment, could legislate as to the prohibition of medicinal prescriptions, it must be held that it thereby possesses a power which the States themselves never intended—and even were unable—to confer by legislative action.

Moreover, in the present case the most convincing medical authority is to be found in the Appendix, to the effect that, at times, it is essential to administer alcohol through the rectum.

In order, therefore, to have the inhibition of the Volstead Act concerning medical prescriptions upheld, the words "appropriate legislation," in the Amendment, must be construed as entitling Congress, under its commission to prevent the use of *intoxicating liquors for beverage purposes*, to forbid the administration of alcohol by means even of the nutritive or stimulating enema.

Perhaps unreason may attain to a more superlative degree in asserting that the legislation com-

plained of is "appropriate"; but we submit that the most resourceful sophistry could not conceive of it.

POINT III.

To deprive the sick of their medicine, which in the opinion of their physician, however administered, is essential to their cure, is not a justifiable exercise of police power in preventing the use of alcoholic liquor for beverage purposes.

Practically every citizen of the United States living in civilized communities and within reach of physicians, will sooner or later have to rely upon their best skill and scientifically-trained judgment. As each crisis arises the patient naturally demands that as his right; and it would seem fundamental that the sick should be entitled to the best that medical science can offer in their cure. To deny this service from any motive whatsoever would seem to savor of inhumanity. When the issue is life or death with an individual, general motives of public policy concerning third parties would seem to be remote.

Cases are recognized where, due to some sudden calamity, a man's private property must be sacrificed for the public good. His house may be destroyed to prevent the spread of plague or fire, and he has no remedy. His property is held subject to the welfare of the general public. It is also recognized that in time of war, when the existence of society is at stake, the life of each member is at the command of the Government. In time of peace, however, when there is no emergency or

impending calamity, the Government is without right to deprive one man of his life for what it may deem a general public advantage, when the deprivation of the life is not based upon any theory or fault or wrongdoing in the individual. If this power is to be found in government, particularly in a government of defined powers, it would seem that the guaranty of life has become merely rhetorical.

The question in the case at bar is further emphasized by the fact that such power is asserted, not under a plenary police power, but under a carefully defined and limited grant of power from the States to the Federal Government. *The power of depriving one man of his life certainly cannot be derived from the power of preventing other persons from drinking intoxicating liquor for pleasure.*

It is not in any theoretic or technical sense that this case presents the issue of life and death. The National Prohibition Act recognizes the use of alcoholic liquor as a medicine on a physician's prescription, but has so prohibited the amount in any period of time that its use as a medicine in the general run of cases is made impossible.

On the very face of the Act itself appears the most daring discrimination with regard to the medicinal use of alcohol. The limitation which is imposed upon physicians in prescribing and administering intoxicating liquor is not placed upon sanatoriums and similar institutions. In short, under the act a patient may not receive the amount of intoxicating liquor his physician deems *necessary*, if that should be more than one pint of liquor

in ten days, but if the patient can secure admittance to or be removed to a sanatorium, the restriction is lifted. The indefensible character of this inconsistency requires no further argument. The statement itself is the argument.

The absolute prohibition of the prescription of alcoholic liquor as medicine by physician to patient in amounts of more than one pint in ten days (one-half pint of alcohol in ten days), is particularly arbitrary when compared with the provisions of the same acts for the use of wine for sacramental purposes. Here no necessity of physical life or death or health is involved. Yet no limitation is placed upon rabbi, minister, rector or priest in religious rites. The numbers of communicants are not specified; the times of the ceremonies are not prescribed. Amounts in excess of certain amounts are not prohibited. In other words, the whole use is the subject of regulation, rather than prohibition. A proper regard is shown for religious liberty without basing it upon any view as to the efficacy of any particular ritual.

The prohibitions in the Act on the subject of prescriptions of alcoholic liquor are doubly arbitrary when compared with legislations on the subject of drugs or criminal operations.

In the recent case of *United States* v. *Doremus*, 249 U. S., 86, where the Harrison Drug Act was before the Court, it will be noticed that such Act excepted from its provisions the dispensing of drugs to patients by physicians.

So, also, the State statute on the same subject before the Court in *Whipple* v. *Martinson*, 256 U. S., 41, made a similar exception of administration or prescription of drug to patient by physician.

Even in legislation on the subject of criminal operations exception is either specified or construed by the courts as existing in case the operation is, on the advice of a physician, necessary to save life. *Commonwealth* v. *Sholes,* 13 Allen, 554.

The need of one pint on physician's prescription is recognized in the statute. In the event, however, that the physician, in his professional opinion, regards two pints as essential to the saving of life, the law compels him to give one-half of the necessary amount. This, surely, cannot be on any theory that the patient he is treating and of whose necessities he is the sole judge, does not in fact need the two pints. It must be upon some theory that the patient who needs it may not get it, but that there is a hazard that someone else who does not need it may use it for beverage purposes. This hazard of abuse, if it exists, certainly is not a proper basis for prohibition as distinguished from regulation. To classify one pint as medicinal, and two pints of the identical substance as non-medicinal, is purely arbitrary.

If as the Court has said in the National Prohibition Cases, 253 U. S., 350, at 387, "there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement" certainly the limit is transcended when liquor absolutely and without exception is prohibited for medicinal purposes where the patient in the preceding nine days has been given one pint on prescription. The prohibition of prescription here involved is beyond any power granted by the Amendment.

Freund, Police Power, page 210, §223:

> "All prohibitory laws make an exception in favor of sales for medical purposes. This is not a legislative indulgence but a constitutional necessity, since *the state could not validly prohibit the use of valuable curative agencies on account of a remote possibility of abuse. 'The power of the legislature to prohibit the prescription and sale of liquor to be used as medicine does not exist, and its exercise would be as purely arbitrary as the prohibition of its sale for religious purposes.'*" (Quoted from *Sarrls* v. *Commonwealth*, 83 Ky., 327.)

In *State* v. *Larrimore*, 19 Mo., 391, the statute contained no exception in favor of the sale of liquor by a physician as medicine. Nevertheless it was held that the statute must be so construed as to include such an exception. The Court said in reversing this conviction:

> "If this instruction had left the question to the jury, whether the defendant had, in good faith, sold the brandy to a sick person as a medicine, and he had then been convicted, we would not have disturbed the judgment. Physicians are not to become dramshop keepers, under color of their professional practise. *If a physician, upon his professional judgment that a sick person needs brandy, administers it as a medicine, in good faith, and charges for it, he is not to be punished; because such liquor, properly used, is a valuable medicine.* But if he sells it to a man who is well, or sells it to a man who is not well, without exercising his professional judgment, and determining that it is necessary for the sick person, he is indictable. His exemption from the fine is not to rest upon the strong wish of the individual purchasing to have the liquor,

nor merely upon the judgment of such person that the liquor would be useful to him as a medicine, but must be founded upon the judgment of the physician that it is a medicine which the diseased man requires.

"In the present case, the instruction given to the jury makes the defendant liable for selling the glass of brandy, and declares that his being a physician, and having sold it as a medicine, does not excuse him. Now the question which they should have been required to decide was whether he really administered the liquor to a diseased person, as a medicine, upon his professional judgment of its necessity. As given, the instruction might have made the defendant liable in a case in which he should not have been fined."

The distinction between *sales* by physicians (which may be prohibited) and *prescriptions* (which may not be prohibited) is brought out in *Sarris* v. *Commonwealth*, 83 Ky., 427, 331-332 (*supra*). In this case the statute permitted physicians to administer and prescribe liquor, but required them to keep certain records, etc. The Court said:

"The social order, health and security of a local community may, in the opinion of the Legislature, require that the selling or giving of spirituous, malt or vinous liquors, to be used as a beverage, be prohibited, as to which, as well as any other subject affecting the health or morals of a community, that department of the government has the power to determine; and it is not inconsistent with that object to authorize the sale of liquors as medicine when necessary for that purpose; on the contrary, while the Legislature has the power to regulate the sale of liquors to be used as a beverage, or to prohibit its sale for that purpose al-

> together, *it cannot exercise that power so arbitrarily as to prohibit the use or sale of it as a medicine.*"

And again:

> "If the Legislature has the power at all to prohibit the sale of intoxicating liquors by retail, it exists alone because the health, peace and order of society require it; and upon that ground alone this court, without dissent, has heretofore decided it may be exercised; but there being no reason therefor, *the power of the Legislature to prohibit the prescription and sale of liquors to be used as medicine does not exist,* and its exercise would be as purely arbitrary as the prohibition of its sale and use for religious purposes."

In *Union* v. *States,* 76 Ind., 524, defendant, a druggist, had been convicted of selling whiskey for medicinal use without a license. The conviction was reversed, upon the ground that the sale was not unlawful. The Court said:

> "It is true that the statute, under which the appellant was indicted, contains no exceptions authorizing the sales of intoxicating liquors, without license, for medicinal, chemical or sacramental purposes. But is has always been held by this Court, in construing similar statutes, that the courts will exempt, from the prohibitory or penal provisions of the statute, all *bona fide* sales of such liquors for such purposes."

Congress, in prohibiting the prescription by a physician of more than certain rigidly defined amounts in a rigidly defined period of time, therefore, not only exceeded the power exercisable on this particular subject, but clearly exceeded any

power granted it under the Eighteenth Amendment which merely prohibited certain defined classes of relationship in regard to intoxicating liquor for *the limited purpose of preventing its use as a beverage.*

In *Adams* v. *Tanner*, 244 U. S., 590, the Court, in regard to an unjustified use of the police power of the State, at 594, said:

> "Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation for any one of them by the public. *Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked.*"

In *Children's Hospital of the District of Columbia* v. *Adkins* (not yet reported), the Circuit Court of Appeals of the District of Columbia, in holding unconstitutional the Minimum Wage Law of the District of Columbia (Act of Congress, September 19, 1918), pointed out that although the act was passed for the benefit of workers, in the particular instance before it, it resulted in the prevention of any employment whatsoever, the Court saying:

> "The right of Willie Lyons to contract her labor in any lawful calling is a property right,

of which, if the property clauses of the Constitution mean anything, she cannot be deprived. When the minimum wage of $71.50 per month for women was fixed by the Board in this District, Willie Lyons was operating an elevator in the Congress Hotel at a wage of $35.00 per month and two meals per day. As a result, she lost her position. The law worked but one way. The hotel manager was not compelled to employ her at a fixed wage, and her position went to a man, who was willing to perform the service at a lower wage than that fixed by the Board. She was without the power to compel her employment, and, because of her inability to measure up to the minimum scale, the law to promote the good morals and general welfare of the community cast her adrift."

The Court held the law unconstitutional, saying:

"The police power cannot be employed to level inequalities of fortune. Private property cannot by mere legislative or judicial fiat be taken from one person and delivered to another, which is the logical result of price-fixing. As was said by Mr. Justice Pitney, in the Coppage case: 'But the Fourteenth Amendment, in declaring that a State shall not "deprive any person of life, liberty or property without due process of law," gives to each of these an equal sanction; it recognizes "liberty" and "property" as co-existent human rights, and debars the States from any unwarranted interference with either. And since a State may not strike them down directly, it is clear that it may not do so indirectly, as by declaring in effect that the public good requires the removal of those inequalities. that are but the normal and inevitable result of their exercise, and then invoking the police power in

order to remove the inequalities without other object in view. The police power is broad, and not easily defined, but it cannot be given the wide scope that is here asserted for it, without in effect nullifying the constitutional guaranty.'"

In the case at bar the complaint alleges and the answer admits the necessity in the professional opinion of the complainant of prescribing alcoholic liquors in the prohibited amounts. Cases under complainant's observation and subject to his professional advice, as alleged in Paragraph Ninth of the complaint, present such necessities. In each and every case the law constitutes a deprivation of such necessities from the patient. This wrong to the individual is the necessary consequence of the prohibition.

In this case Congress has furthermore reached over into a realm beyond its jurisdiction, and has prohibited prescriptions to the sick where there was no logical relationship to the prevention of the use of alcoholic liquor for beverage purposes.

In *Hammer* v. *Dagenhart*, 247 U. S., 251, under the child labor legislation of Congress, analogous situation was presented to the Court. The Court, at page 273, said:

"The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture.

"The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution."

The Court, at page 276, concluded:

> "It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend."

In *Bailey* v. *Drexel Furniture Co.* (Advance Opinions, June 15, 1922), wherein another act of Congress on the subject of child labor was before the Court, it was said, per Taft, Ch. J.:

> "It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not intrusted to Congress, but left or committed by the supreme law of the land to the control of the states. We cannot avoid the duty even though it require us to refuse to give effect to legislation designed to promote the highest good."

The prohibition Acts place physicians of standing in embarrassing dilemmas as to morality and law. They have to choose between violating not only their moral obligation toward their patients, but violating the substantive law of their State, on the one hand, and violating the terms of the Federal statute, on the other. If a physician gives less than his best judgment in the treatment of his patient, it is not only a moral wrong, but it is a violation of his contract and of his legal duty toward the patient under the substantive law of the State.

Under the law of New York State, he is obligated by his contract *to use his best judgment in the exertion of his skill and the application of his diligence.*

> *Carpenter* v. *Blake*, 10 Hun, 358;
> *Carpenter* v. *Blake*, 50 N. Y., 696;
> *Boldt* v. *Murray*, 2 N. Y. St. Rep., 232.

He is not a physician unless he holds himself out as able not only to diagnose, but to prescribe (Public Health Law, §160).

Dr. Lambert states in Paragraph Ninth of the complaint:

> "Complainant conceives it to be his duty and intends, unless restrained by lawful authority, to issue prescriptions in cases according to his best skill and judgment."

An injunction should issue against interference by the public authorities with this duty.

The prohibition of prescriptions contained in the Prohibition Act and the Act supplemental to Prohibition are unconstitutional and void. This result however does not impair the general legislation or even the regulations (as distinguished from prohibition) now contained in the acts on the subject of medical prescriptions. On the contrary, as below stated, complainant and the physicians who adopted the resolution attached to the complaint advocate regulations safeguarding proper prescriptions and preventing any abuse by unworthy practitioners.

POINT IV.

Ruppert v. Caffey, 251 U. S., 264—sustaining the definition in the Volstead Act of intoxicating liquors as liquors containing only one-half of one per cent. of alcohol—is no more authority to sustain Congress in having prohibited physicians' prescriptions than is Purity Extract Co. v. Lynch, 226 U. S., 192.

No other conclusion than that arrived at by the Supreme Court was to be expected.

For under the decisions of many of the Courts of the States which adopted the Eighteenth Amendment, it is clear that any Act of Congress for the enforcement of the Act might, if Congress so chose, thus define intoxicating liquors.

It was equally clear, however, that under such decisions Congress could in nowise limit the amount of alcoholic liquor which might be prescribed for medicinal purposes.

It is, of course, common knowledge that prior to the enactment of the Eighteenth Amendment statutes providing for the prohibition or regulation by license of the manufacture and sale of intoxicating liquors for beverage purposes had been passed in nearly every State of the Union. In a great many of the States the means to insure the successful enforcement of the statute had been incorporated into the legislation itself as a provision reducing the alcoholic content of liquors. The legal volume of alcohol declared to be non-intoxicating ranged from the now familiar ½ of 1% to 2.75% in the various statutes, and in one instance a law of Maryland permitted "4% of alcohol by weight." Undoubtedly the Congress was cognizant of such State legislation and of the decisions which declared that a reduction of the volume of alcohol to a mere scintilla was constitutional and a proper method to secure enforcement. It was within the province of Congress accordingly to adopt similar legislation in providing for the enforcement of the Eighteenth Amendment. In effect the State Legislatures adopting the Eighteenth Amendment sanctioned the use of the same means which they had themselves employed and which had been supported by the decisions of the State courts.

It becomes of conclusive significance, therefore, that in many instances the same States which thus found it lawful to define as intoxicating any liquor which contained more than the statutory content of alcohol, in order that actual prohibition might be realized, *permitted freely the use of otherwise intoxicating liquors as a medicine.*

An example of this so-prevalent situation is to be found in the statutes and decisions of Vermont, one of the first States to adopt regulatory legislation. In 1902 the State Legislature defined intoxicating liquors to include "ale, porter, beer, lager beer, cider, all wines, or any beverage which contains more than 1% of alcohol by volume." (*General Laws, 1917,* §6452.) This definition was sanctioned and enforced by the Courts in the case of *State* v. *Costa,* 62 Atlantic (Vt.), 38. The Court said:

> "If, however, the preparation is capable of being used as a beverage, and is sold or kept for sale with the purpose, intent or understanding that it is to be used as a beverage, then, if it contains more than 1% of alcohol an offense is committed."

It had, however, already been determined in Vermont that the prohibtion of drinking liquor for pleasure could not constitutionally be deemed so sweeping as to include certain lawful uses of alcoholic liquors—as, for instance, when prescribed as a medicine. In *Fabor* v. *Green,* 72 Vt., 117 the Court had held that "the mere fact that the liquid can be and is swallowed does not make it a beverage," and the *Costa case* (*supra*) had very properly determined that the statute did not prohibit medicinal use of alcohol. The Court there held:

> "So it must be said, in the case of extracts, tinctures, essences, and compounds having a legitimate use for medicinal, culinary and toilet purposes that the mere presence as a solvent, preservative or otherwise or more than the proportion of alcohol named in the statute does not make the preparation one to which the statute applies. In respect to such articles the inquiry is not simply whether they contain more than 1% of alcohol, but there is the further inquiry whether or not the articles are sold to be used as a beverage."

And if "the mere fact that the liquid can be and is swallowed does not make it a beverage" surely the fact that the liquor is administered as an enema forbids the conclusion or even the thought that it is a beverage.

In Iowa the Legislature passed an act prohibiting entirely the use of beverages containing alcohol. One of the first cases arising under the statute was that of the *State* v. *Intoxicating Liquors*, 76 Iowa, 243. In sustaining the confiscation of certain liquors which contained "2.42 per cent. of alcohol by weight and 3.02 per cent. by volume; and the other portion contained 2.58 per cent. by weight and 3.22 per cent. by volume," the Court said, per Seevers, C. J. (p. 245):

> *The liquir in question contained alcohol, and therefore it, as a matter of law was intoxicating.*"

On the other hand, the Legislature of Iowa enacted a statute which regulated the sale of intoxicating liquors for medicinal purposes. The Supreme Court of Iowa held in the case of *State* v. *Aulman*, 76 Iowa, 624, that this was a proper exercise of the legislative function. The Court said (p. 626):

> "The amendments adopted by the act in question were of a character to prevent the sale of intoxicating liquors to be used as a beverage, rather than to secure the public against their improper use as a medicine by reason of the ignorance of the pharmacist."

Similarly in Texas the State Legislature had adopted a sweeping reform permitting the enactment of legislation designed to bring about absolute prohibition. Under this authorization the Legislature submitted to various localities the right to enforce prohibition by local option, but incorporated into this later Act a reservation in favor of sacramental and medicinal use of intoxicating liquors. The Courts of Texas have repeatedly held that both the prohibitory legislation and the subsequent permitted exceptions in favor of wines for the sacrament and for medicine are constitutional. For example the Court said in *McLain* v. *State of Texas*, 43 Texas Criminal Reports, 213:

> "Under the local option law, sales of intoxicants are prohibited, except (1) when used for medicinal purposes, and (2) for sacramental purposes. *The constitutionality of this law was attacked because of these exceptions; the contention being made that, as the constitution had prohibited the sale, therefore the legislature could not make these exceptions.* This court held otherwise in Bowman's Case, 38 Tex. Cr. R., 14; 40 S. W., 796; 41 S. W., 635."

In Rhode Island perhaps the most comprehensive statutes and interpretive decisions are to be found with regard to controlling the liquor traffic. To enforce the prohibition for beverage use of intoxicating liquors a law was passed defining intoxicating liquors as any which contained 2 per

cent. by weight of alcohol. This legislation was found to be constitutional.

State v. *Gravelin*, 16 R. I., 407, at p. 408.

Even the use of alcohol as a medicine was most stringently regulated in Rhode Island; but it is of vital significance that medicinal liquor was not included in the prohibition.

State v. *Duggan*, 15 R. I., 403.

In *Town of Selma* v. *Brewer*, 9 Cal. App., 70, 76-78, defendant, a pharmacist, was charged with the violation of an ordinance which prohibited, among other things, the keeping, possessing, etc., of liquor.

The Court said:

> "It is, we think, a matter of common knowledge, as much so as are the uses to which quinine is medically put, that many, if not all, of the liquors mentioned in this ordinance are often deemed to be necessary to be used for medicinal purposes. Of course, as in the case of certain poisons ordinarily sold at drug stores, *the sale of liquors for medicinal purposes* by pharmacists or druggists *may be*, by *the public authorities, confined to such purposes* and otherwise subjected to proper and reasonable regulation, or to the imposition of such conditions and restrictions as will safeguard, protect and preserve the rights of the public. * * * The sale of opiates and other more drastic poisons, by regularly licensed druggists, is hedged about by restrictions which, as a protection to the public, the law has an unchallengable right to impose, *but it has never been supposed for an instant that the sale of such drugs could be prevented.*"

In Kentucky it has been held that there is no sanction in the police power for the prohibition of liquor to be used as a medicine or for sacramental purposes. The enforcement of prohibition for beverage purposes could be aided only by proper regulating licensing of medicinal sales—the very contention of the complainant and his colleagues in the present case. Notably in the case of *Commonwealth* v. *Fowler*, 96 Ky., 166, the Court of Appeals in upholding the right of the state to require licenses from druggists dealing in intoxicating liquors on prescription, said:

> "Without governmental interference or consent, we say the farmer may till his soil, the merchant may buy and sell, the lawyer and the doctor practice their professions, and the druggist and pharmacist compound their medicines. And if, by reason of shysters and quacks, an injured people demand protection, or if, because ill-behaved druggists or pretended pharmacists debauch the public morals by dealing out intoxicating liquors and nostrums as beverages, yet the pursuit of these callings cannot be prohibited. The innocent and honest druggist cannot be restrained of his liberty by reason of the dishonest practices of others. His pursuit, being in itself harmless, and, indeed, useful, and capable of being conducted without harm to the public, cannot be prohibited, and this is true of every legitimate act going to make up and constitute his trade or profession. It is as true of his right to fill a prescription for whiskey as a medicine as it is of his right to fill one calling for calomel. As said by this court in Sarrls *v.* Com., 83 Ky., 332, *'The power of the legislature to prohibit the prescription and sale of liquor to be used as a medicine does not exist, and its exercise would be as purely arbitrary as the prohibition of its sale and use for re-*

ligious purposes.' But to prevent or lessen the abuses which experience has demonstrated will likely follow the traffic in whiskey, in any form, the state may place watches over it; may enact all sorts of police regulations; may require licenses, and establish strict official inspection and police surveillance. The efficiency of the license system, as fairly attaining the supervision aimed at, is attested by common experience. The officers of the law, by a mere inspection of the records, may at once know where the business is followed as to which their supervision and oversight are needed."

Tiedeman in his text on the control of Persons and Property, says in Section 85, at page 239:

"The profession of medicine is a proper and necessary calling, and if pursued only by men, possessed of skill, instead of threatening public evils is of the highest value to a community. *The only evil,* involved in the prosecution of that calling, *is that which arises from the admission of incompetent men into the profession. Police regulation of the practice of medicine must, therefore, be confined to the evil, and any prohibition or other restrictive regulation which went beyond the exclusion of ignorant or dishonest men, would be unconstitutional."*

POINT V.

Regulations drawn by an executive department under a delegated power, which are in derogation of the statute which they are intended to enforce, are illegal, just as a statute which is in derogation of the Constitution is invalid.

Those portions of the Regulations which have been promulgated by the Treasury Department purporting to enforce the Volstead Act with regard to the regulation of the traffic in spirituous liquors which go beyond the scope of the Act itself in the matter of enforcement and penalties, are unconstitutional and invalid. Regulations which seek to enforce an Act of Congress and which are prepared by one of the Executive Departments of the Government under a delegated power, must be within the limits and in furtherance of the enabling Act and must not in their effect subvert or be in derogation of the Act.

This is the rule applied in *Williamson* v. *United States*, 207 U. S., 425, where certain regulations of the Land Office with reference to the statute providing for the sale of timber and stone lands were challenged as being drastic far beyond the authorization of the Act of Congress. In the opinion of the Court, per Mr. Justice White, it was held (p. 462):

> "This power must in the nature of things be construed as authorizing the Commissioner of the General Land Office to adopt rules and regulations for the enforcement of the statute, and cannot be held to have authorized him, by such an exercise of power, to virtually adopt rules and regulations destructive of rights which Congress had conferred."

See, also,

Morrill v. *Jones*, 106 U. S., 466, at 467;
St. Louis Independent Packers Co. v. *Houston*, 215 Fed., 553, 559;
United States v. *11,150 Pounds of Butter*, 195 Fed., 657;
Leecy v. *United States*, 190 Fed., 289, 292.

In promulgating the regulations purporting to enforce the Volstead Act, the Treasury Department provided, with respect to the prescription of liquors by physicians, Sec. 77 (a):

> "No prescription may be issued for a greater quantity of intoxicating liquor than is necessary for use as a medicine by the person for whom prescribed, and in no case *may spirituous liquor in excess of one pint within any period of ten days be prescribed for the same person by one or more physicians.*"

It is nothing short of an indefensible arrogance for the Treasury Department to assume a power *not* granted by the Volstead Act and to regulate as to what two physicians may do under the act for one patient. That is not within the province of the Treasury Department under the authorities cited, and is an usurpation of the grant of regulatory power not expressly delegated and is consequently invalid.

The decision of the Supreme Court of the United States in *Waite* v. *Macy*, 246 U. S., 606, is significant in this connection. The Court there held, to quote the headnote:

> "A transgression of its statutory power by an administrative board is subject to judicial restraint although guised as a discretionary decision within its jurisdiction."

POINT VI.

The allegation in defendant's answer that "large numbers of reputable and responsible physicians throughout the United States" do not believe that the use of spirituous liquors is ever necessary in medical treatment, is beside the point. Constitutional rights are not to be thus determined.

Nevertheless, the majority opinion of medical practitioners in the United States and renowned clinicians the world over pronounce the use of alcohol an absolute necessity in the treatment of disease.

The assertion contained in Paragraphs Fourth and Fifth of the answer, that large numbers of eminent physicians deny that alcoholic liquors have any value as a medicine and believe that it is never a necessary medicine, is not determinative of any issue, and tends to weaken rather than to sustain any opposition to Dr. Lambert's position in this case. It is not for defendants' counsel to find sanction for this gross usurpation of medical judgment on the part of the Congress, by resolving what may be a debatable question in favor of one group of physicians and against another. The Eighteenth Amendment did not establish the Congress as an arbiter of medical controversy.

Nevertheless lest there be any doubt in the mind of the Court that the question as to whether or not, in the minds of a majority of physicians, alcohol is a necessary and valuable therapeutic agent, it becomes appropriate that counsel point out the overwhelming authority which sustains and clarifies the position of Dr. Lambert. In an Appendix to his brief, therefore, the attention of the Court

is directed to the medical authorities. The Appendix contains a summary of medical text books and sets forth the results of the physician's referendum on the medical value of spirituous liquors, and a collation of opinions of eminent clinicians upon this question.

The illuminating article by the late Doctor Jacobi is especially referred to as showing how the Volstead Act affects the physician in matters of life and death.

Moreover, the Referendum furnishes conclusive evidence that the majority opinion of the medical profession in the United States is in accord with Dr. Lambert, that the free use of alcohol is necessary in the treatment of certain diseases.

In 1921, on behalf of the American Medical Association, a Referendum was conducted as to the subject of the therapeutic value of alcohol. A questionnaire was sent out to more than one-third of the physicians of the country, in which each physician was requested to state as to whether or not he deemed alcohol a *necessary* therapeutic agent. The word *"necessary"* was deliberately employed rather than the less definite term "desirable" or "advisable" in order that the results might be determinative of the question and not leave room for quibble. Fifty-eight per cent. of the physicians returned their questionnaires to the Association, and of these 51% attested to the therapeutic necessity of whiskey. As stated, a full extract from the journal of the American Medical Association as to the final report on the subject appears in the Appendix.

In addition, the attention of the Court is respectfully called to the unquestionable evidence contained in textbooks on treatment and practice, written by eminent physicians for use by medical students and medical practitioners. The endorsement of alcohol as a curative medicine, even among those clinicians who recommend its cautious use, seems to be well-nigh universal.

An unprejudiced perusal of this Appendix must fortify the conviction that the Congress has dangerously overstepped the bounds of police power, in imposing its medical judgment upon the physician, and in depriving the patient of his right to the medicine and quantities of medicine which his medical adviser deems *necessary* to preserve and sustain him, whether administered through the mouth or the rectum.

POINT VII.

As a substitute for the unconstitutional prohibitions of the Volstead Act in the giving of prescriptions and the invalidity of the regulations, there can be appropriate, salutary and comprehensive legislation and regulations, not as to the prohibition, but as to the conditions of issuing such prescriptions.

These, however, must take the form not of prohibition but of regulations and must be directed not against the practice of medicine by Dr. Lambert, but against the subterfuges of the unworthy practitioner for violation of the Act. In so far as such regulations have this purpose in view, Dr. Lambert and all like physicians would be required to conform to them. Required is scarcely the ap-

propriate word, so much would they welcome such restrictions.

There are many effective forms which such regulations might take.

The provisions under the so-called Harrison Drug Act suggest one. The Harrison Drug Act makes it a crime to give drugs to addicts, but does not unconstitutionally seek to limit the amount of drugs which a physician may give to the ordinary patient. It provides that prescriptions be kept for two years, subject to visitation by governmental authorities, so that it may be known whether the Drug Act has been violated.

The Association for the Protection of Constitutional Rights has suggested another regulation still more restrictive and drastic:

> "Further Resolved, that the members of this Association, however, favor and will advocate the enactment of such Regulations as will require physicians prescribing alcoholic liquor in such amounts as they deem proper, to file any and all prescriptions with properly designated Governmental authorities, in order that any abuse by unworthy practitioners of the right to administer alcoholic liquor may be prevented and the offenders adequately and summarily punished."

Under such a Regulation the unworthy practitioner would, so to speak, *write a count in his own indictment.* In association with this required filing of the prescription, the Government might well establish the Dispensing Depot, wherein could be obtained—what notoriously is often not now obtainable—proper medicinal liquor for internal and external use.

Again, this might be provided by Regulation: The punishment for the first offense under the Volstead Act—and in the eye of the Law the second offense is not committed until after a conviction for the first offense—is now but $500 to the bootlegging doctor. That punishment can, with much propriety and effectiveness, be markedly increased. It can be made a misdemeanor only by imprisonment. There are precedents for such punishments, notably in the anti-gambling statutes of the State of New York.

Then, further, the bootlegging doctor can be reached effectively in other ways. Every physician whose impounded prescriptions for alcoholic liquors justify suspicion and investigation might be compelled to file an affidavit with the governmental authorities to the effect that he has prescribed liquor only for medicinal purposes. And at regular intervals he can be required to file an affidavit stating that, during the period between the filing of such affidavit and that of the preceding one, he has not prescribed any liquor for other than medicinal purposes. The affidavit, if false, could be made to subject the offender, not to a fine of $500, but to the punishment for perjury—to the loss of his liberty and of his citizenship.

There are many other restrictions which Dr. Lambert and his associates believe can be resorted to for the elimination of the bootlegging doctor. There are no pains and penalties too rigorous or unrelenting for the violators of the spirit and letter of the Amendment.

All such provisions, however, must, as has been pointed out, be directed against the use of alco-

holic liquors for beverage purposes, and not for medicinal purposes. They must in nowise trespass upon the right of the physician to heal and even save the sick according to his untrammeled judgment, merely because there are members of that profession who, unless restrained, would prostitute their high calling for the accompanying criminal and abhorrent profit of trafficking in intoxicating liquors for beverage purposes.

The malefactor can be appropriately and adequately dealt with by constitutional methods; the Amendment confers no authority upon Congress to adopt any other method.

As has been stated, the provisions of the Volstead Act under Sections 6 and 10, in reference to wines for sacramental uses, furnish illustration of the sole constitutional method of legislation by Congress as to liquors for medicinal purposes.

These, it will be seen, are in nowise prohibitions, but merely regulations—designed to detect and apprehend and punish the violator who criminally diverts such wines to beverage purposes.

In this direction Congress and the Executive Department may go to the reasonable length, dictated by wise judgment, as to liquors for medicinal purposes. They may proceed in no other direction and deal with prohibition instead of regulations. *They have conformed to the constitutional method in one case and wholly departed from it in the other.*

POINT VIII.

Defendants' motion to dismiss should be denied and the complainant should be given the relief prayed for in the complaint.

Respectfully submitted,

DAVIES, AUERBACH & CORNELL,
Attorneys for Complainant.

JOSEPH S. AUERBACH,
MARTIN A. SCHENCK,
Of Counsel.

APPENDIX OF MEDICAL DATA.

The Explanation and Results of the Referendum of Physicians on Behalf of the American Medical Association as to the Necessity of Alcohol for Treatment of Diseases.

The Referendum on Alcohol, Reprinted from the Journal of the American Medical Association.

In hearings before Congress, in the discussion of regulations issued by the Internal Revenue Department, in fact, in practically every discussion of prohibition, contradictory statements have been made as to the views of physicians on the value of alcoholic beverages as therapeutic agents. Several scientific organizations have adopted resolutions on the subject. So far as we know, however, no attempt has heretofore been made to ascertain, in a direct way, the opinions of any considerable number of physicians.

In order to secure the views of a representative portion of the medical profession, a questionnaire was sent to more than one-third—53,900—of the physicians of the United States.

The excellent response, reaching 58 per cent. of replies and representing 21.5 per cent. of the physicians of the country, a percentage of return seldom attained by the questionnaire method, has been gratifying as an indication of the interest taken by our profession in this attempt to secure an adequate expression of its views.

Some have taken exception to the word "necessary," claiming that no drugs are absolutely necessary, and that "desirable" or "advisable" would have been a better word for the purpose. This

point was given careful consideration in formulating the question. Moreover, the word "necessary" is used in the National Prohibition Act itself (Section 7, Title II):

> * * * And no physician shall prescribe liquor unless after careful physical examination of the person for whose use such prescription is sought, or if such examination is found impracticable, then upon the best information obtainable, he in good faith believes that the use of such liquor as a medicine by such person is *necessary* [italics ours] and will afford relief to him for some known ailment.

The word "advisable" or "desirable" would have been as much too mild as "necessary" is, perhaps, too strong; "necessary" does not mean indispensable, and it was properly regarded by practically all who answered the questionnaire.

The criticism has been made that the question as to whether whiskey is a necessary therapeutic agent is a scientific one and cannot be decided by resolution or by votes. This is true; and the referendum was to secure the *opinions* of physicians on the subject, not to decide a scientific question. It is granted that the physiologic effects of alcohol are matters which may be determined in the laboratory; but therapeutics is the application of such findings to the treatment of disease as determined by the opinions of physicians. This and the experience of physicians—for the opinions necessarily are based on experience and observation—may be determined, as has been done, by the questionnaire.

The questionnaire has brought out definitely the fact that the present regulations governing the medicinal use of alcoholic beverages are not satis-

factory—in fact, many physicians declared them "intolerable." Many who were convinced that these drugs were not necessary therapeutically were emphatic in stating that other physicians who believed them necessary were entitled to have their views respected, and were warranted in efforts to have the drugs made available without incurring the odium attaching under the present regulation.

The Questionnaire.

> "Q. Do you regard whiskey as a necessary therapeutic agent in the practice of medicine? A. The total vote in all states on whether or not whiskey was *necessary* in the treatment of disease was 30,843; 15,625, or 51 per cent., answered yes, and 15,218, or 49 per cent., answered no."

Authorities Recommending the Use of Alcohol as a Curative Agent.

The late Dr. Abraham Jacobi was widely known and widely revered in his profession and among laymen. In an article on Alcohol Medication, published in American Medicine, New Series, Volume VIII, No. 9, pp. 575-577, written as recently as September, 1913, Dr. Jacobi says:

> "An editorial in the July number of AMERICAN MEDICINE (p. 459) refers to the latest views on alcohol as expounded by Ewald. It states that 'all theories to the effect that it is to be classed as a stimulant are about exploded.' It is also asserted that 'those who are always waiting for some medical oracle to speak can now come over without fear to the modern consideration of alcohol as a sedative or anesthetic. The writer begs leave to say that

the 'explosion' has not reached his ears. But then, he is quite willing to admit he is not an oracle, surely less so than Ewald who never claimed to be one. If he ever had done so, he would have forfeited his rights, when, as the editorial says, he maintained that alcohol would no longer be used in illness. That time must never come, and as far as I can see, should not come, *for there are conditions which absolutely demand the use of alcohol as a prominent part of medication.*

* * * * * *

"I do not care to class alcohol anywhere. It has been called, or eulogized as a stimulant, a sedative, an anesthetic, an inhibitory and depressant power, aye as a paralyzer. I do not contest observations and experiments either on healthy or diseased men, and on animals. Indeed, I have great respect for experiments and observations in and out of our laboratories, and at your northern exposure windows. One of the most profitable laboratories, however, is the hospital and the private bedside. They have the advantage over an experiment on a dog or a rabbit, for while the experimenter on the latter is not infrequently devoid of clinical observation, when he publishes his result, the clinician seldom, if ever, appeals to the attention of his peers before he has confirmed his observations by scores or hundreds of cases. Great clinicians are more circumspect than loud. Hippocrates, the great, says more frequently than any of his successors, 'it seems to me.'

"Having been in uninterrupted contact with diphtheria since 1853 when it began its renewed murderous attack on our part of the world, I have anxiously looked for means to mitigate or heal what too often manifests itself as absolutely fatal. The virulent epidemics of forty years ago have furnished the

formidable examples of sepsis and gangrene which in part were mitigated by my introduction of nasal irrigations, and sometimes restored to final health by local doses of alcoholic beverages. I shall return to that.

* * * * * *

"When in 1860 I began to tracheotomize in diphtheritic laryngitis, I had three recoveries among my first five cases. They were published. Then—lo and behold, in the early seventies I had more than one hundred operations without a single recovery. So I learned wisdom and caution. This is why *after sixty years of practice when I trust in alcohol as a powerful remedy in cases of diphtheritic and other sepsis, I may be credited with ample experience both in successes and failures extending over half a century.* What I offer is no theory, and no laboratory experiments on the well or sick guinea pigs. My laboratory has been different. My life has been spent amongst the sick only, and the recovering and dying."

"A few stray specimens of my observation are as follows: With one of my most respected colleagues I saw thirty-five years ago a boy of five years. Membranes covered his fauces and mouth and part of the lips, and were visible in the nares. Round the neck were big lymph-body swellings, now known to all of us as the sure proof of thorough mixed infection. Some membranes could be removed by forcible injections into the nose. It had been bleeding and oozing; the odor was foul. The second heart sound still slightly perceptible, pulse 160, hardly felt at the wrist. Boy restless in his semi-coma, tossing about, feet bluish, not cold, covered with erosions and subcutaneous hemorrhages of different sizes. His whole surface discolored, from drab to blue; hemorrhages small and large in and un-

der the skin. No intestinal hemorrhage. Urine could not be obtained. My friend told me I was not called by him but by the family of the dying boy; he was going down town and on his way would order the undertaker to send the coffin after dark. I begged him not to do that, but to wait until to-morrow. The undertaker, however, came after dark and left disgusted. Meanwhile I had permission to act. The boy's stomach retained my whiskey, from one to two teaspoonfuls every 15 or 25 minutes, diluted in water, occasionally in milk or coffee, and his rectum retained a few doses. Within a day he took a pint and a half, perhaps more. We kept on, the boy and I. He was alive when I happened to meet him twenty years afterwards.

"A girl of seven years I found in about the same condition thirty years ago. She was a patient of one of our great physicians who, when he died suddenly a year ago, proved to the world that there are some men who are indispensable. He said, 'Now, here, I have given your whiskey but she will die.' How much is she taking? 'Besides her other drugs she is taking as much as half a pint each of these two days, and retains it.' Very well, just continue, and I will give her my additional half pint. So we did, she took a pint or more daily. And got well.

"A boy of three years with the formidable symptoms of mixed infection was 'given up.' I held out the hope of recovery provided the doctor would succeed in getting into him with other appropriate medication, at least a pint of whiskey daily. He did succeed. Five days afterwards the father called in despair, saying his child was alive but insane. So he was, the boy was better; in fact, on the way to recovery, but drunk. To me that was a welcome occurrence, for I knew, and want my reader to know, that *no amount of whiskey will lead to*

intoxication when its effect is wanted to combat sepsis. I repeat: No amount of alcohol will intoxicate a thoroughly septic person. As soon as my little patient did no longer require his big dose of alcohol, it made him 'insane,' intoxicated."

Standard American Text Books on the Practice of Medicine.

Austin Flint, M. D., L. L. D., says in the *Treatise on the Principles and Practice of Medicine*, page 983, with regard to the treatment of typhoid and typhus fevers:

> "Alcoholics have entered largely into the treatment of fevers in this country during the last thirty years. That they have been used too freely and indiscriminately can hardly be doubted. As a natural consequence, there is perhaps at the present moment a tendency to undervalue their importance. * * * Observation of their immediate offices in certain cases shows their utility—often in a very striking manner. * * * Used with proper application and moderation, they form an essential part of the supporting treatment of fevers as well as of all other diseases which destroy the life by asthenia."

James M. Anders says, in *A Text Book of the Practice of Medicine* (14th Ed., with assistance of John H. Musser, Jr.), page 50:

> "Alcohol is less commonly employed at present than formerly, it is of some value in combating unfavorable nervous symptoms due to the typhoid septicaemia. The quantity to be administered must be regulated by its effects, since it may act injuriously and even aggravate the symptoms though this is seldom the case. * * * Threatened collapse may

be met by full doses of alcohol (½ oz. every hour). * * * Effective doses of diffusible stimulants, as champagne, are useful during periods of sudden circulatory depression."

Page 117.—Is against using alcohol in lobar pneumonia.

Page 138.—Recommends use of alcohol in influenza.

Page 167. Recommends alcohol in septicaemia and pyaemia.

Page 209.—Recommends alcohol in scarlet fever.

James Tyson says, in *The Practice of Medicine* (6th Ed., with M. Howard Fussel), page 28:

"Alcohol is not a heart stimulant as formerly supposed. That a certain amount may be utilized as food is certain. That alcoholics afflicted with typhoid fever need some form of alcohol seems certain, therefore alcohol is used in good doses 30 to 60 cc. every two or three hours in alcoholics in the early stages, but is gradually reduced in amount. * * *

"When the heart muscle begins to flag, the pulse becomes rapid, and the patient extremely weak, doses of 15 to 30 cc. (½-1 oz.) may be given every two or three hours with good effect. * * * A low muttering delirium, feeble dicrotic pulse, and dry tongue are among the indications which imperatively demand small amounts of alcohol."

Page 40.—Typhus fever. Alcohol should be given as in typhoid.

Page 267.—Recommends alcohol in lobar pneumonia, in form of whiskey or brandy.

A. A. Stevens, M. A., M. D., Professor of Applied Therapeutics in the University of Pennsylvania,

says in *The Practice of Medicine*, page 125, with regard to the treatment of diphtheria:

> "Notwithstanding the fact that much has been written against the use of alcohol many clinicians of long experience believe that this drug is decidedly useful when asthenia is pronounced. For a child of three or four years a dram may be given every three or four hours."

Standard American Text Books on Therapeutics.

Hobart Amory Hare says, in a *Text Book of Practical Therapeutics*, page 78:

> "Notwithstanding the almost universal use of alcohol as a stimulant by the laity and the medical profession, it cannot be denied that evidence of scientific character and weight is constantly being brought forward which shows that its dominant action is depressant upon all parts of the body. * * * Nevertheless *clinical experience, too great to be ignored, stands for the continued employment of the drug.* The drug does not act as a stimulant in the ordinary sense of the term, but nevertheless readjusts the circulation by dilating the peripheral vessels and influences the protective powers of the body by affecting the blood cells or the blood stream or the lymph."

Oliver T. Osborne, in *The Principles of Therapeutics*, page 242, says:

> "The internal therapeutic use of alcohol should be entirely separated from a consideration of alcohol as a beverage or from the prohibition standpoint. Alcohol is a drug, and as such has many valuable uses. * * * There are times, for individuals who are weak, and in old age, when a little bitter tonic which contains alcohol, taken before meals, is perfectly legitimate treatment. In the age when alcohol could be obtained, it was a per-

fectly harmless proposition, in old age, with sleeplessness, to order a small amount of alcohol in the form best suited to the individual, to be taken before bed time. It is in such cases much less likely to do harm than is a stronger hypnotic drug."

Reynold Webb Wilcox says, in *Materia Medica and Therapeutics*, page 742:

> "*Alcohol is of immense advantage* in many instances of febrile disease. * * * It is by no means adapted for all varieties of fever, and hence its effects should always be carefully watched. * * * While it is often given when quite unnecessary, there are many instances in which it is of inestimable value in such affections as typhoid and typhus fevers, pneumonia smallpox, cholera, and diphtheria and also in gangrene pyaemia, septicaemia, etc."

Foreign Authorities.

British.

In the INDEX OF TREATMENT BY VARIOUS WRITERS, edited by Robert Hutchinson, M. D., and James Sherren, C. B. E., revised to conform with American usage by Warren Coleman, M. D., Assistant Professor of Medicine, University and Bellevue Hospital Medical College, Visiting Physician to Bellevue Hospital, New York, 1921:

LEWIS SMITH, M.D., F.R.C.P., Physician London Hospital—

> Recommends iced champagne in small quantities in the treatment of Addison's disease.

GRAHAM STEELL, M.D., F.R.C.P., Emeritus Professor Victoria University of Manchester, Consulting Physician Royal Infirmary, Manchester—

Recommends alcohol in the form of brandy in the treatment of angina pectoris.

W. J. HADLEY, M.D., F.R.C.P., F.R.C.S., Physician, Pathologist and Lecturer in Medicine, London Hospital, Physician City of London Hospital for Diseases of the Chest—

Recommends judicious administration alcohol in cases of bronchial asthma. Believes that alcoholic stimulants are sometimes needed in the treatment of catarrhal bronchopneumonia.

C. W. DANIELS, M.B., Camb., M.R.C.S., F.R.C.P., Lecturer Tropical Diseases London Hospital and London School of Medicine for Women. Physician, Albert Bock Hospital—

States that in the treatment of black water fever alcoholic stimulants are required after the second day.

CECIL WALL, M.A., M.B., Oxon., F.R.C.P., Physician London Hospital and Hospital for Consumption, Brompton, Consulting Physician Poplar Hospital—

Recommends stimulants in small quantities in the treatment of acute bronchitis and in the treatment of chronic bronchitis suggests increasing doses of the best brand of whisky obtainable.

E. W. Goodall, O.B.E., M.D., B.S., Medical Supt. Northwestern Hospital, Hampstead—

Recommends strychnine, brandy and similar stimulants in cases of cardiac failure in diphtheria. Recommends brandy up to 4 oz. in 24 hours, and in desperate cases 3 to 4 oz. of good champagne every 2 or 3 hours in case of acute infectious diseases.

W. H. Clayton-Greene, C.B.E., M.B., B.C., Camb., F.R.C.S. Honorary Consulting Surgeon Richmond Royal Hospital, Lecturer of Surgery St. Mary's Hospital Medical School, Surgeon St. Mary's Hospital, King Edward VII Hospital and King George Hospital—

States that alcohol may be required in the treatment of erysipelas.

Arthur P. Luff, C.B.E., M.D., B.S.C., F.R.C.P., Consulting Physician St. Mary's Hospital—

Admits that alcohol may even be necessary or desirable in the treatment of gout, a disease in which alcohol must be avoided if possible.

Byrom Bramwell, M.D., F.R.C.P.E., L.L.D., F.R.S. E., Consulting Physician Edinburgh Royal Infirmary—

Recommends alcohol as a stimulant in relieving urgent symptoms of cases of valvular heart disease.

E. W. Goodall, O.B.E., M.D., B.S., Medical Supt. Northwestern Hospital, Hampstead—

States that in the treatment of measles when complicated with severe diarrhoea, stimulant is required in the form of brandy. For the same disease he prescribes two grains sul-

phate of quinine every 4 hrs. with an alcoholic stimulant in the form of brandy or Champagne. Prescribes for the treatment of scarlet fever hypodermic injections of strychnine and brandy and Champagne by the mouth.

GRAHAM STEELL, M.D., F.R.C.P., Emeritus Professor Victoria University of Manchester, Consulting Physician Royal Infirmary, Manchester—

Says of the treatment in cases of myocardial failure "alcohol, no doubt, acts largely like a nitrite dilating the arterioles and so relieving the heart."

W. J. HADLEY, M.D., F.R.C.P., F.R.C.S., Physician, Pathologist and Lecturer in Medicine London Hospital, Physician City of London Hospital for Diseases of the Chest—

States with regard to the treatment of pneumonia that he personally prefers strychnine and digitalis for cardiac stimulation before resorting to alcohol, but recognizes its necessity in some cases. He also commends the use of alcohol in pneumonia as a soporific to induce rest and sleep.

SIR ROBERT W. PHILIP, M.A., M.D., F.R.C.P.E., F.R.S.E., Senior Physician Royal Infirmary and Royal Victoria Hospital for Consumption, Edinburgh—

States that alcohol may be administered as

States that alcohol may be administered as a stimulant in the treatment of pulmonary tuberculosis according to the individual need. Whiskey, wine, beer or stout in various amounts may be given to the patient. He says further that "the administration of alcohol offers distinct advantages in the pyrexia of ad-

vanced disease * * * as to form, pure spirits (whiskey, brandy) is usually wisest diluted in milk or mixed with eggs and milk as egg flip or in alkaline water."

F. J. Poynton, M.D., F.R.C.P., Physician University College Hospital, Physician Hospital for Sick Children, Great Ormond Street—

Recommends alcoholic stimulant in cases of acute rheumatism. He says "brandy and dry Champagne are the most useful stimulants."

Gilbert A. Bannatyne, O.B.E., M.D., F.R.C.P., Consulting Physician Royal Mineral Water Hospital and Royal United Hospital, Bath—

Says of the treatment of rheumatoid arthritis "stimulants are often of service, especially sound wine; but each case must be considered separately and should the stimulant increase pains it must be discontinued." In the diet list he includes "alcoholic drinks as prescribed (whiskey, wines and malt liquors)."

Robert Hutchison, M.D., F.R.C.P., Physician London Hospital and Physician Hospital for Sick Children, Great Ormond Street—

Says of the treatment of scurvy that "cider and the French and Italian wines are also curative drinks." And in seasickness "iced champagne may be given freely."

W. H. Clayton-Greene, C.B.E., M. B., B. C. Camb., F.R.C.S., Honorary Consulting Surgeon Richmond Royal Hospital, Lecturer of Surgery St. Mary's Hospital Medical School, Surgeon St. Mary's Hospital, King Edward VII Hospital and King George Hospital—

States in case of septicaemia and pyaemia that "alcohol is of undoubted value, and may be used freely."

C. W. DANIELS, M.D., Camb., M.R.C.S., F.R.C.P., Lecturer Tropical Diseases London Hospital and London School of Medicine for Women, Physician Albert Bock Hospital—

> In treating yellow fever says "alcoholic stimulants should not be resorted to at the commencement, but are usually required on or after the third day."

Arthur Latham, M. D., F. R. C. P., Physician and Lecturer on Medicine at St. George's Hospital, London, in the *Oxford Index*, says of the treatment of pneumonia, page 719:

> "Stimulants should not be given as a routine measure but in accordance with the condition and previous habits of the patient. As soon as the pulse becomes at all unsatisfactory alcohol should be given in the form of old brandy or champagne. At first two to five ounces of brandy in the twenty-four hours is sufficient, but the quantity may have to be pushed to ten ounces."

French.

G. LYON, *Traité Elementaire de Clinique Therapeutique*, 1920, page 1369—

> *Infectious diseases:* With respect to alcohol, in all its forms, certain groups of cases must be distinguished. *Alcohol is useful in all typhoid conditions*, and should be administered especially in the form of old Bordeaux or Burgundy wines of which as much as a bottle daily may be given; dry champagne, well diluted with water (a quarter of a bottle), old whiskey or rum which serve to prepare "grogs"; "Kirsch," or cherry brandy, which is usually given in milk. Alcohol itself should be given only in relatively weak doses (50-60

G. daily). In mild or moderately severe cases of typhoid fever, the above-mentioned doses of alcohol represent the maximum allowance.

Alcohol in Pneumonia: An immense therapeutic advance was made by the institution of alcohol-medication, by Todd, first limited to the treatment of pneumonia and then extended to that of all other infectious diseases. In restricting the indications of alcohol, Todd gave it only in the pneumonias of alcoholic patients and in adynamic or infectious pneumonias. Loss of strength being the rule in aged and cachectic patients, alcohol is here invariably indicated, as well as in secondary pneumonias and ataxo-adynamic or typhoid pneumonias, with or without hyperthermia.

A. RICHARD. *Précis de Therapeutique et de Pharmacologie*, 1910, page 642—

"Since some years, a frequently equally exaggerated reaction seems to have set in against the old opinion, and alcoholic medication is now entirely rejected by some extremists. The majority of clinicians, however, still admit that alcohol, administered in moderate doses and temporarily, may be very useful in a certain number of febrile diseases, both as an accessory and easily oxydized food, and against the adynamic symptoms."

A. MARTINET, *Therapeutique Clinique*, 1921, Tome II, page 1137—

"According to recent findings, alcohol is an even better food for diabetic patients than suggested by older investigations. It diminishes to a considerable extent the formation of acetones, improves the assimilation of sugar, and favors still more than the fats, the metabolism of nitrogenous foods. It is therefore rational to replace in cases of severe dia-

betes a portion of the fats in the diet by alcohol."

M. MINELLE, *L'Alcohol en Therapeutique Infantile Maladies Aigües Febriles, These de Paris,* 1903. Speaking only of sick children, Minelle says—

> Alcohol medication should be reserved for the treatment of general prostration and collapse, in the course of acute febrile diseases of children. Under the conditions, alcohol through an active stimulation of the central nervous system seems to exert a tonic effect upon the cardiovascular apparatus, with a strengthening action. The alcohol should always be given diluted and in small doses, stopping its use after the therapeutic effect has been accomplished.

German.

H. CURSCHMANN, *Der Unterleibs-Typhus,* Monograph, Vienna, 1898, page 428—

> *"In spite of all theoretical objections, alcoholic agents are indispensable for the practitioner in the treatment of typhoid fever as well as in the treatment of acute febrile diseases in general. Personally, I would not care to treat typhoid fever patients at certain stages and in certain conditions, without the assistance of alcohol."* The old prejudice against a fever-increasing effect of alcoholics has been definitely removed by the findings of Ziemssen, Jurgensen, and Liebermeister. Although a theoretical explanation meets with difficulties, the stimulating effect of alcoholic agents upon the circulation and respiration has been positively established and from the practical viewpoint.

F. PENZOLDT, *Lehrbuch der Klinischen Arzneibehandlung*, 1921, page 127—

"Ethyl alcohol in the form of alcoholic beverages, under individualistic employment, constitutes an inestimably valuable remedy in the treatment of numerous, especially febrile diseases, more particularly in cases of heart failure. Alcohol was extensively used in former centuries, and is at present considered by the mayority of physicians as an important adjuvant in the treatment of many diseases. Recently, voices have been raised to discredit this remedy, and based upon their laudable zeal to prevent the abuse of alcoholic beverages in general and to restrict an exaggerated therapeutic use of alcohol, some writers have gone so far as to question various curative properties, hitherto attributed to alcohol. The opposition is based too much on the partly incomplete and contradictory results of experimental investigation. Unprejudiced estimation of experiences at the bedside arrives at very different results. In the first place, it is very noteworthy that under appropriate employment—(a necessary condition for the use of any remedy)—*alcohol has never been known to cause visible damage*. Positive benefit, as shown by experience, is produced by alcohol. * * * According to Penzoldt's experience, the most extensive possible use of alcohol should be made, *unconditionally*, in grave cases of diphtheria, and septic infection, more particularly puerperal sepsis."

C. A. EWALD, *Der Alkohol Bei Infektions-Krankheiten*, Mediz, Klinik, 1913, IX, page 1233—

Although Ewald is opposed to the use of alcohol in infectious diseases and also in pulmonary tuberculosis, he points out that the

stimulating action of alcohol on the heart may apparently be utilized to advantage in grave cardiac collapse, of toxic as well as of mechanical character, due to hemorrhage.

M. GRUBER, *Der Einfluss des Alkohols auf den Verlauf der Infektionskrankheiten*, Wiener Klin. Wehschrift. 1901, XIV, page 479—

According to the judgment of experienced clinicians and careful observers, alcohol seems to have an excellent effect in certain diseased conditions, where it may be practically indispensable. Besides being indispensable in dyspepsia and in diabetes, alcohol is also considered as an indispensable analeptic agent in the treatment of collapse. *Professional experience has shown that large doses of alcohol may have a positively life-saving effect in cases of acute collapse.*

Alcohol in Nutrient Enemata.

FORCHHEIMER, F.—*The Prophylaxis and Treatment of Internal Diseases.* D. Appleton & Company, 1906.

Alcohol in Heart Diseases. Page 384.

Alcohol is a valuable remedy in heart affections; this is proved more by the results of actual experience than by those of experiment. In small doses it acts as a stimulant producing dilatation of the blood vessels; whether it directly affects the heart beneficially has not been conclusively decided, although it is more than likely that it does so. It is of service in those conditions of the heart that are due to infections; it may be used to counteract the vasoconstrictor effects of digitalis. In the so-called senile heart, indeed in

any of the cardiac affections of old people, it is practically indispensable.

Treatment of Ulcer of the Stomach. Page 277.

The best nutrient enema is the one first recommended by Leube, a mixture of scraped meat and chopped raw pancreas, with which occasionally a patient may be kept in good condition for a long time. Between the other methods there is very little choice; my preference is for peptonized milk, with or without eggs, to which I add 30 gm. or one ounce of brandy when a stimulating effect is required.

Alcohol a Specific Antidote in Acute Poisoning by Carbolic Acid. Page 588.

In the place of the sulphates alcohol may be used, either in the form of whiskey or as alcohol very slightly diluted. Two or four ounces may be given by mouth after the stomach has been emptied; *an additional amount may be injected into the bowel.* The alcohol may be repeated at intervals of one or two hours according to the demands of the case.

MATAS, R.—*Surgery of the Vascular System.* I Surgery of the Pericardium and the Heart. Keen's Surgery, Volume V, 1909, p. 17.

Post-operative treatment: Hypodermics of strychnine with digitalis or digarten, and small doses of morphine and atropin will do good, especially when combined with the cautious administration of black coffee, hot tea, champagne, and other forms of alcoholic stimulants of the kind that the patient is accustomed to. Treatment of hemorrhage. See page 197:

"These external measures are effectively assisted by hot stimulating solution injected

slowly into the rectum, strong black coffee being especially available and beneficial. The formula for post-operative shock, acute anemia, or exhaustion usually prescribed by myself is: Black coffee 8 ounces; panopepton 1 ounce; *brandy or whiskey* 1 ounce; tincture of digitalis 15 minims; laudanum 10 minims; to be administered slowly and repeated every two hours if the case still calls for it. *Champagne, whiskey, or brandy, which are as diffusible by rectum as by stomach, may be freely given by enema,* diluted with physiological salt solution or combined with other ingredients, when for any reason they cannot be taken by the normal route."

Further on, Dr. Matas says that when frequent stimulation is required to strengthen the flagging heart, *champagne, whiskey and brandy toddies,* and black coffee, may be given by mouth.

EUTIS, ALLEN C., B. S., R. B., M. D., New Orleans. Assistant Demonstrator of Chemistry, Medical Department of Tulane University; Visiting Physician to Charity Hospital. New Orleans Med. and Surg. Jrl. 1904-1905, Vol. LVII, page 18—

"My own experience with nutrient enemata is confined to the post-operative treatment of twenty-three laparotomie performed by Dr. E. S. Lewis, assisted by Dr. T. T. Lemann and Dr. C. N. Chavigny, to whose service I was assigned at the time. All of these patients were nourished exclusively by nutrient enemata for from thirty-six to forty-eight hours, and in some cases for seventy-two hours. The enemata consisted of *brandy* ½ oz., Tr. Opii 5 minims, and peptonized milk, 4 oz. Occasionally the white of an egg was added. They were given every four hours and to each

alternate one were added eight ounces of normal salt solution. I was struck by the fact that with very few exceptions those patients complained very little of thirst and of hunger, and we resorted to very little stimulation."

"Another case in which I used the same enemata was one of my own, in which there was a carcinoma of the pylorus very far advanced. The patient was a female fifty-two years of age, who was unable to retain anything by the mouth, but whom I was able to keep alive for three months by this method of alimentation."

WOOD, HORATIO C.—*Therapeutics, The Principles and Practice*, Tenth Edition, page 35.

Half a pint to a pint of milk with two or three eggs may be employed at each injection. When stimulants are required, half an ounce to an ounce of *brandy* may be added to each injection. The alcohol should always be added just before administration.

During the earlier stages of phthisis or consumption, alcohol taken with codliver oil, or in small amounts with the food at meal times, conduces not so much to the comfort as to the well-being and recovery of the patient.

Administration: When a mild stimulant is wanted in the beginning of fevers, especially if milk punch seems too "heavy," wine whey may sometimes be used with advantage. It is made by pouring a *half-pint of sherry or madeira* into a pint of boiling milk, stirring thoroughly, and after coagulation has occurred, straining off the whey, which may or may not be sweetened, according to the taste of the patient. *Mulled wine* is often very grateful to patients as a change. It is made by beating an egg up thoroughly with three fluid ounces of *sherry* and adding a like quantity of water, which must be actually boiling

when poured in. *Champagne* is useful in patients with delicate stomachs, especially if nausea or vomiting actually exists, and also may be employed with advantage in sudden failure of the vital powers, especially in elderly persons. It must be very "dry," i. e., as free as possible from sugar. Milk punch is prepared by adding from a dessert spoonful to a fluid ounce of brandy, whiskey, or rum, according to the degree of stimulation required, and the taste of the patient, to three fluid ounces of milk with sugar and nutmeg to taste.

Endocrinology and Metabolism.

Edited by
Lewellyn F. Barker

Associate Editors
R. G. Hoskins—Herman O. Mosenthal

D. Appleton & Co. 1922

Chapter on Artificial Feeding by Herbert S. Carter, p. 812—Rectal Feeding. Sample Formula.

Dextrose	20-50 gm
Alcohol	20-50 gm (cc)
Pancreatized milk	1000 cc
Salt	5-9 gm

This may be given in a 250 cc dose every 4-6 hours, and if well tolerated aids materially in helping the patient to tide over an emergency. By omitting the milk the solution is useful:

1. Simple exhaustion.
2. In Septic conditions.

3. As an antidote to chloroform; in phosphorus poisoning; or anything that causes fatty degeneration of the liver, *e. g.*, toxaemia of pregnancy and in diabetic acidosis and acetonaemia.

4. After abdominal operations, especially in undernourished or dessicated individuals.

(*Above represents 1 1-3 to 3 1-3 oz. of whiskey daily* by rectum in 24 hours.)

C. S. Bacon:

In pernicious vomiting of pregnancy.

Glucose	50 gm
Alcohol	50 cc
(Salts, etc.)	
Distilled water to 1000cc	

From 300 to 500 cc of mixture three times a day.

Journal American Medical Association, June 8, 1918, p. 1750.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

SAMUEL W. LAMBERT,
Complainant,

against

EDWARD C. YELLOWLEY, as Acting Federal Prohibition Director, DAVID H. BLAIR, as Commissioner of Internal Revenue, and WILLIAM HAYWARD, as United States Attorney,
Defendants.

COMPLAINANT'S REPLY BRIEF.

POINT I.

The so-called beer cases referred to in the District Attorney's Main Brief are in no sense authorities against complainant.

The Brief while urging as its Third Point that the case at bar "is on all fours with and is decided by the so-called beer cases," admits, nevertheless, on page 11, that in *Falstaff Corporation* v. *Allen*, 278 Fed., 643, upon which so much undue emphasis is laid, the medicinal value of beer was not even involved. The outstanding feature of all of these cases, however, is that the right of a physician to prescribe was in no way involved. The suits were all by brewers to protect an as-

serted right of manufacture, and fall within one of the five prohibited relationships specified in the Eighteenth Amendment. The brewers claimed no right to prescribe and in the Falstaff case claimed no medical value in the malt liquors. The particular provisions of the Volstead Act made the basis of the case at bar are not in any way involved in any of these cases. Even the arguments as distinguished from the issues in such cases were directed to the supplemental Prohibition Act on the subject of malt liquor. Surely it cannot be seriously contended that any dictum of the Court in the Falstaff case or in any of these cases can be controlling or even influential in the case at bar.

This case for the first time, so far as we have been able to ascertain, presents the question. There are no decisions against complainant's contention that the Volstead Act in prohibiting physisians from prescribing intoxicating liquor transcends the obvious limitations of the Eighteenth Amendment.

POINT II.

The State statutes cited in the District Attorney's Main Brief and Reply Brief emphasize the fact that "beverage purpose" as used in the Eighteenth Amendment excludes medicinal use.

The complainant urges that "beverage purpose" as used in the Eighteenth Amendment is a clear term of limitation; that at the time the amendment was submitted to the states for ratification such term, in state statutes and decisions, *had*

commonly been accepted as excluding medicinal use. The conclusion should therefore be irresistible that when the Amendment was adopted this was the only construction attributable to the phrase by the different state legislatures.

Neither on oral argument nor in his Brief, has the District Attorney suggested any other construction or meaning, or any construction which would at the same time escape the plain intention of a restriction on congressional power.

The District Attorney, by implication if not by direct statement, rejects the rule of construction which is that while the test as to the constitutionality of a State statute is whether or not it is inhibited by the State Constitution, the test as to the constitutionality of an Act of Congress is whether or not authority for its enactment is to be found in the Federal Constitution. He seems not to realize that only the presence of the inhibition condemns the one while the mere absence of authority condemns the other.

And yet, until this rule of construction is declared obsolete by the Courts, it is respectfully submitted that the Volstead Act in the particulars complained of must be held to offend against the Constitution.

The Brief of the District Attorney refers to a number of state statutes on the subject of liquor. Some of these statutes were passed after the Eighteenth Amendment, and therefore can have no legitimate bearing upon the construction of its language, being merely the exercise by the state of "concurrent power" of state enforcement in the Amendment. So far, however, as these statutes have any bearing on the point we have presented, they furnish additional support to complainant's

argument. *Beverage purpose whenever used in such legislation is in contradistinction to medicinal use.*

In the Alabama statute, for instance, which is the first referred to in the Brief, the Act of 1919 in its definition of prohibited liquors and beverages included any liquor, drink or beverage made or used for *beverage purposes* containing any alcohol. It contained a prohibition of sale for medicinal purposes *except on the prescription* of a regularly authorized practicing physician.

The Act of Florida contained a provision that nothing in the act should be construed to make unlawful the manufacture and sale at wholesale or to transport or cause to be transported from within or without the state alcohol for medicinal, scientific or mechanical purposes, or wine for sacramental purposes.

The laws of Indiana are not accurately summarized at page 17 of the Government's brief. Section 13 therein provides that it shall be unlawful for any licensed physician to issue a prescription for intoxicating liquor *except in writing,* or in any case unless he has good reason to believe that the person for whom it is issued will use the same for medicinal or surgical purposes or as an antiseptic.

So also the Code of Iowa is inaccurately summarized by the Government. The section employs the term "intoxicating liquors" unreservedly, and under a decision of that state no malt liquor capable of use as a beverage can be sold without prescription by the druggist.

The Kansas statute also is inaccurately summarized. The Act prohibits the manufacture and sale

of intoxicating liquors *except* for medicinal, scientific and mechanical purposes, and regulates the manufacture and sale thereof for such excepted purposes. The statute and its amendments except from its operation medicinal use of intoxicating liquors.

The statutes of Maine referred to on the Government's brief provide that no person shall sell any intoxicating liquors of whatever origin "for tippling purposes or as a beverage."

In the statutes of New Hampshire, referred to at page 18, it is provided:

> "Before a physician shall give to any person a prescription for intoxicating liquor, he, the physician, shall make a diagnosis of the disease of the person applying for the prescription, and shall exercise the same professional skill and care in giving a prescription for intoxicating liquor, as in giving a prescription for any poisonous or habit-forming drug, and shall give definite directions as to the amount and frequency of the dose."

The statute of South Dakota, referred to at page 18, allows, with regulations concerning prescriptions, including the standing of the physician, and so forth, the prescription of intoxicating liquors. The act is directed against intoxicating liquors capable of use as a beverage, but in due compliance with regulations the physician may prescribe freely.

The laws of Tennessee referred to on page 18, regulate the prescription of intoxicating liquors by physicians.

Several of the drastic State legislations—for instance, that of Utah—are not only obviously unconstitutional under the State decisions we have

cited in our Main Brief, but plainly have not been the models on which the Eighteenth Amendment has been patterned. In fact, it may be said that the Eighteenth Amendment has been fashioned after the *conservative* State legislation, whereas the Volstead Act has gone beyond its bounds and has been fashioned on the *drastic and radical* State legislation. In this conflict the Constitution must prevail.

Again the District Attorney on page 19 of his main brief asserts that in States such as Colorado, Michigan and Minnesota the amount of alcoholic liquor which may be prescribed was strictly limited before the passage of the Eighteenth Amendment. We have not been able to find any justification for such statement in the laws of Colorado. Michigan and Minnesota directly contradict it. In each of these States the Act specifically excludes from the prohibition the manufacture, sale or transportation of liquor for medicinal purposes. It then goes on to regulate medicinal prescriptions. It does not in any way limit the amount which may be prescribed by a physician to a patient in any period of time. In each instance the Act merely limits the amount which may be prescribed upon one prescription. In Minnesota it must not be more than one pint of liquor, and in Michigan it must not be more than eight ounces of liquor on any one prescription. *Nothing prevents, however, two or more of such prescriptions being given by a physician in the same morning or afternoon.*

In other words, the law constitutes a regulation of the manner in which liquor must be prescribed, but in no respect constitutes a prohibition on

amount. It is a perfectly proper regulation that in regard to any definite amount of liquor, whether eight ounces or one pint, there shall be the certification that such amount is needed. It is an entirely unwarranted and unconstitutional prohibition, however, which would in all cases and without exception prevent a physician in giving more than a rigidly fixed amount in a rigidly fixed period of time. This the Volstead Act attempts to do, and this, moreover, neither of the state statutes referred to in the Government's brief in any way purports to do.

Apparently it is the contention of the Government that if it can show that any State legislation, no matter what its phraseology, attempted to prohibit or curtail the right to prescribe intoxicating liquor as a medicine, the Eighteenth Amendmeent should be so construed.

On the contrary such a situation must lead to a directly opposite judicial conclusion.

Here were the various State statutes on the subject passed under the plenary police power of the States. The task before the framers of the Eighteenth Amendment was to convey to Congress an amount of power to be evidenced in written terms. If the intention was to seek to convey such power to the extent sought to be exercised in some of the States, the written terms must have expressed such intention. And while it is at best doubtful whether it would have passed into the fundamental law of the land in such a form, the fact remains, that from all of the examples before them, the framers of this fundamental law chose, not the most extreme and unlimited or in fact unwarranted examples, but that form of legislation which had been construed as excluding prohibi-

tion against medicinal prescription. This circumstance, we confidently submit, removes the subject from the realm of controversy.

The statutes cited by the Government, therefore, not only emphasize the meaning of the term "beverage purpose," but show that such term was carefully and advisedly selected as a term of limitation. The obvious intention displayed from the very words of the Eighteenth Amendment is that Congress should not have a police power which was a roving commission to deal with the subject.

The District Attorney, on page 2 of his Reply Brief, curiously enough states that the case of *State* v. *Durein*, 70 Kans., 1 (aff'd 208 U. S., 613), is conclusive on the point of the right of the State legislature to prohibit the prescription of any intoxicating beverage as a medicine.

Even were this statement correct, the fact would have no determining effect upon the decision in this case, where we are dealing solely with a Federal Constitutional Amendment of distinct limitations.

His assertion, however, is quite unsupported by the facts in that case which were thus tersely summarized in the first paragraph of the case:

> "On June 28, 1902, Miss Blanche Boies, Mrs. Henry Howard and others of a praying-band, five in number, went to certain rooms in a brick building at No. 402 Quincy Street, in the City of Topeka, and found there a flourishing beer-saloon. In the place were a bar and shelves and bottles and glasses and tables. Men were sitting at the tables playing cards, and a dozen others were at the bar drinking. A man behind the bar was handing out beer to them, which they drank and

paid for, one of the women seeing the money pass. One of the women asked the bartender if that was Mr. Fritz Durein's saloon, and he said it was. She asked for the proprietor, and he said he was Fritz Durein. In the course of a conversation with him he told the women he did not think it wrong to keep a saloon; that it was not against his religion, and that he intended to keep right on running a saloon and selling beer. He drank a glass of it himself and asked the women to have some."

It was urged on behalf of this saloon keeper that inasmuch as the statute provided that no one should sell liquors for medical, mechanical or scientific purposes without a permit obtained from a Probate Judge, that the statute was unconstitutional and that, therefore, the saloon keeper could not be punished for selling liquors without the permit. The Court determined that the statute was not unconstitutional in this respect. It will be noted that the power of a state to prohibit prescriptions by a physician was not in issue; that on the contrary the statute contained no prohibition of such subject, but did contain regulations. It will further be noted that medicinal prescriptions were in nowise involved in the litigation, the accused being a saloon keeper accused of selling liquor over the counter in his saloon.

Moreover, it is increasingly clear to us, as we read the District Attorney's Reply Brief, that we have been unable to make intelligible to him our thought in referring to State statutes and State decisions on the subject of intoxicating liquors for beverage purposes. We have, nevertheless, devoted this discussion to citations in his Main and Reply Briefs, not because they are relevant, but

for the reason that we do not wish his argument, though irrelevant, to go unchallenged.

It was for such a reason that—in reply to the equally irrelevant allegation of the answer that some other physicians were not in accord with Dr. Lambert—we added the Appendix to our Main Brief.

We ask the indulgence of the Court in repeating from Point II of our Main Brief the following:

> "In order to hold that Congress under the delegated police powers from the States, pursuant to the Eighteenth Amendment, could legislate as to the prohibition of medicinal prescriptions, it must be held that it thereby possesses a power which the States themselves never intended—and even were unable—to confer by legislative action.
>
> **"Moreover, in the present case the most convincing medical authority is to be found in the Appendix, to the effect, that, at times, it is essential to administer alcohol through the rectum.**
>
> "In order, therefore, to have the inhibition of the Volstead Act concerning medical prescriptions upheld, the words "appropriate legislation," in the Amendment, must be construed as entitling Congress, under its commission to prevent the use of *intoxicating liquors for beverage purposes*, to forbid the administration of alcohol by means even of the nutritive or stimulating enema."

POINT III.

The claim of the District Attorney on his oral argument that a decision of this case in complainant's favor would entail confusion in the enforcement of law, is unwarranted.

This is not a case where the decision of unconstitutionality would go to an entire act of Congress and leave a subject uncovered by legislation.

In the main, the Volstead Act is not affected by this suit. Certain very limited provisions as to prescriptions by physicians are alone involved. There would still remain existing regulations which would largely cover the subject, after the prohibition as to medicinal prescriptions in excess of a pint per ten days had been declared null and void. If need be, these could be promptly supplemented by additional regulations.

Moreover, as was stated on the oral argument for complainant, inasmuch as the prohibition of medical prescriptions constitutes a usurpation by Congress of authority never conferred upon it—there should—upon the rendering of judicial opinion to this effect—be an instant realization on the part of the Executive Department of the Government that the subject may be adequately and finally covered by regulations, without recourse to further legal proceedings.

As was stated also on oral argument—in order to prevent any possible immediate confusion as to the sufficiency of the regulations concerning physicians' prescriptions, there might well be—in accordance with the procedure followed in other cases—an interval between the informal an-

nouncement of conclusion on the part of the Court and the rendering of the formal opinion.

It was with a like thought that the complainant's counsel on oral argument volunteered the additional suggestion as to a suspension of the operation of any decree declaring that part of the Volstead Act complained of to be unconstitutional, during the period in which the necessity of any further regulations would be under consideration by the Executive Department. For complainant and the great company of physicians and surgeons whom he represents are as anxious, as should be the Government, that appropriate regulations prevent improper practices, but at the same time allow those trained in their profession to practise it in accordance with their best, and, therefore, untrammeled scientific judgment in their ministry of mercy, through the saving and prolongation of life.

No further legislation by Congress would seem to be necessary. In regard to sacramental wines, practically the only regulation on the entire subject is that the priest, rabbi or clergyman produce his credentials. The complainant and his distinguished associates have voluntarily suggested, in Brief and on oral argument, that they would, in order to detect and apprehend and adequately punish the criminal bootlegging doctor, welcome and promote regulations distinctly more drastic than Congress, in its wisdom, or unwisdom, has made applicable to the unworthy representative of the Church.

We desire to repeat and emphasize all that was said in this regard under Point VII of our Main Brief.

POINT IV.

Defendants' motion to dismiss should be denied and the complainant should be granted the relief prayed for in the complaint.

Respectfully submitted,

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